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# A TREATISE

UPON SOME OF THE

# GENERAL PRINCIPLES OF THE LAW,

WHETHER OF A

LEGAL, OR OF AN EQUITABLE NATURE,

INCLUDING THEIR

RELATIONS AND APPLICATION

TO

# ACTIONS AND DEFENSES

IN GENERAL,

WHETHER IN

COURTS OF COMMON LAW, OR COURTS OF EQUITY;

AND EQUALLY ADAPTED TO

COURTS GOVERNED BY CODES.

By WILLIAM WAIT,

COUNSELOR AT LAW.

VOLUME VI.

---

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# EXPLANATORY NOTE.

In the original plan of this work, it was believed that it could be completed in four volumes. To accomplish this result, large pages were adopted, medium type employed, and a large number of pages given in each volume. The number and variety of subjects discussed, the careful analysis of each article, and the concise style of writing is familiar to every person who has examined the volumes published. And for the purpose of furnishing the latest authorities, it has been necessary to make selections from the thousands of volumes of American and English reports. These selections are embodied in maxims arranged in the order of analysis employed; and this method gives the greatest possible number of legal and equitable principles relating to Actions or Defenses, together with the largest variety of illustrations drawn from all the reports.

The manner of treatment has been as concise as was possible, if the work was to render the best service to the student, the lawyer, and the judge. The last volume, which is the seventh, is now in press, and will soon be ready—thus completing the entire work.

The bar and the bench are requested to examine the volumes of the work, and then determine whether the same variety and number of legal and equitable principles can be found in any other seven volumes published. The selections and illustrations taken from the English reports are of value here; but, the work is intended to be American in its character, and adapted to every portion of the United States.

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# CHAPTER CXXV.

## TELEGRAPH.

### ARTICLE I.

#### OF TELEGRAPHS IN GENERAL.

**Section 1. Definition and nature.** The telegraph (from two Greek words signifying "to write afar") is an apparatus by means of which intelligence is communicated to a distance. Properly it includes the various methods of signalling, but generally it is confined to the magneto-electric telegraph first brought into practical use May 27, 1844, between Washington and Baltimore, and now in such general use that no less than one hundred and fifty thousand miles of wire spread their net work over the United States. Telegraph wires are usually carried over the surface of the country upon poles extending from twenty-five to thirty feet above the ground, and placed from eighty to one hundred yards apart. The intelligence is communicated by means of symbols representing the letters and numerals. The difference between some of the signs or symbols is so slight that it sometimes involves serious consequences. For example, the signs for C and S are nearly alike, and in one case where a merchant telegraphed from New Orleans to his correspondent in New York to protect a certain bill of exchange, the word "protect" was read as "protest." In another (*Leonard* v. *N. Y., etc., Tel. Co.*, 41 N. Y. [2 Hand] 544; S. C., 1 Am. Rep. 446) the word "sacks" was read "casks."

There seem to be three distinct classes of cases in each of which a different degree of liability has been imposed upon telegraph companies. The first class regarding their employment as analogous to that of common carriers of goods holds them to the responsibility of insurers. The second class agreeing with the first so far as concerns their employment, assimilates their liability to that of a passenger carrier. And the third class, differing in every respect from the others, regards their employment as a mere agency and holds them responsible only for the want of ordinary care and diligence.

A telegraph company cannot be considered a common carrier, since it contracts, not in obedience to any common-law obligation, but, in ac-

cordance with certain rules and regulations authorized by statutory law. *Birney* v. *N. Y., etc., Tel. Co.*, 18 Md. 341; *Western Union Tel. Co.* v. *Fontaine*, 58 Ga. 433. The absolute liability of a common carrier was founded upon the necessities of the case, real or fancied, and has never been applied to any person or to any occupation, except those of carriers of goods, and innkeepers. The carrier had the exclusive possession and control of the goods, often in secret, away from the supervision of any other person, with opportunity for embezzlement and collusion with evil-minded persons, and without means of discovery by the owner. Especially was this so in the ruder stages of civilization, and before the present modes of communication, rapid and easy, were in existence. It was upon this view, early adopted as a rule of safety to the community, that the carrier should always be *prima facie* liable, in case of non-delivery of the goods, and that he should not be excused for any causes, except those occurring by the act of God, or of the public enemies, and these were to be shown by himself. Whether his liability is based upon the contract he makes, or upon his public duty, the telegrapher does not come within any of these principles. He has no property intrusted to his care. He has nothing which he can steal, or which can be taken from him. There is no subject of concealment or conspiracy. He has in his possession nothing which in its nature and of itself, is valuable. It is an idea, a thought, a sentiment, impalpable, invisible, not the subject of theft or sale, and as property quite destitute of value. He cannot, himself, see or hear or feel the subject of his charge. He submits an idea to a mysterious agency, which carries it to its destination, and delivers it to one there at hand to receive it. He is bound to conduct the business appertaining to this pursuit with skill, with care, and with attention. He holds himself out as possessing the ability to transmit these communications, and he undertakes that he can and will transmit and deliver them with the expected dispatch. There may be circumstances in the nature of the instrumentality employed, and the effects to be produced, which, in a particular case, will prevent the proper accomplishment of the undertaking. A thunder storm, which prevents or renders dangerous the operation of electrical currents or machines; a tempest, which prostrates poles and breaks the wires; or unusual pressure of prior business; the sudden sickness of an operator, or many other causes, might prove a sufficient excuse for the want of a prompt delivery of a message. But careless reading or ignorant management of the machinery is no excuse; it is simply an aggravation of the offense. *Leonard* v. *The N. Y., etc., Tel. Co.*, 41 N. Y. (2 Hand) 544, 571; S. C., 1 Am. Rep. 446. See *Grinnell* v. *Western Union Tel. Co.*, 113 Mass. 299; S. C., 18 Am. Rep. 485.

Impartiality and good faith are the chief, if not the only, obligations required by the statute, so far as relates to the question of the liability of telegraph companies. Beyond these statute requirements, their obligations must be fixed by considerations growing out of the nature of the business in which they are engaged, the character of the particular transactions which may arise in the course of their business, and the application of principles of justice and public policy recognized alike by common sense and the common law. *The Western Union Tel. Co.* v. *Carew*, 15 Mich. 525.

§ 2. **Organization.** All telegraph lines in England, Canada, and the United States are operated by companies, either under the authority of general laws applicable alike to all companies, or by express charter. In some of the States it is enacted that any *person* or company may construct telegraph lines; but generally the privilege is extended only to two or more. Of course a private person could not be hindered from constructing telegraph lines and carrying on the business of transmitting messages, without authority from the State, provided he had procured the right of way by purchase. But he would not have the right to erect his posts and construct his lines upon the public highway without authority from the State. *Atty.-General* v. *The United Kingdom Elec. Tel. Co.*, 30 Beav. 292.

Whether organized under general laws, or special acts of incorporation, a telegraph company is a private corporation; and this would be so, although the State were the principal or sole owner of the stock. *The Bank of U. S.* v. *The Planters' Bank of Georgia*, 9 Wheat. 904, 908; Vol. 2, chapter on *Corporations*. The privilege of operating its line is a franchise, and a franchise is private property. *West River Bridge Co.* v. *Dix*, 6 How. (U. S.) 507, 534; *Cal. State Tel. Co.* v. *Alta Tel. Co.*, 22 Cal. 398; *Armington* v. *Barnet*, 15 Vt. 745. Contracts made in behalf of a telegraph company with third persons, and for purposes within the scope of the business of the company, although not made in the mode prescribed, if acted upon and recognized by the officers of the company, have been held binding upon it. *Reuter* v. *The Electric Tel. Co.*, 6 El. & Bl. (Q. B.) 88; *Troup's Case, in re Elec. Tel. Co. of Ireland*, 29 Beav. 353. See *Whitwell* v. *Warner*, 20 Vt. 425. If, however, the directors should presume to act beyond the proper scope of their agency, and to direct the funds of the corporation into new enterprises, or to different purposes from those contemplated by the charter, any stockholder might restrain them in equity. *Coleman* v. *The Eastern Counties R. R. Co.*, 4 Railway Cas. 513.

Until a telegraph company is completely organized, the members of it act individually, and each for himself and not as a company; and

the majority cannot bind the minority, unless by special agreement. *Irvine, &c.*, v. *Forbes*, 11 Barb. 587. See *Livingston* v. *Lynch*, 4 Johns. Ch. 573.

For the law applicable generally to telegraph companies as well as other corporations see Vol. 2 of this work, chapter on *Corporations*, pp. 304–352.

§ 3. **Right of way.** In the general statutes of England, Canada, and of all the American States which have general laws on the subject of telegraphs are contained provisions authorizing the construction of telegraph lines along and upon or under public roads and highways and across the waters of the State, and the appropriation of trees to place wires upon. But an interference with travel or an interruption of navigation must be guarded against. Hence but few cases are likely to come before the courts, between private persons and telegraph companies in relation to the appropriation of lands, either by purchase or condemnation, for the purpose of constructing telegraph lines. Still the principles of law governing such cases would in all material respects have the same application as in cases of railways, and such like works of public improvements.

The power given by statute to a telegraph company to carry its wires and tubes *across* a railroad will not enable it to go *under* the railroad. *The South Eastern Railway Co.* v. *The European and Am. Elec. Print. Tel. Co. and Friend*, 9 Exch. 363; 24 Eng. Law & Eq. 513; S. C., 22 L. J. (N. S.), Exch. 113; 2 C. L. R. 467. The act of May 3, 1852, granting an exclusive telegraph privilege between certain points is constitutional. *Cal., etc., Tel. Co.* v. *Alta Tel. Co.*, 22 Cal. 398.

The act of congress (14 U. S. Statute at L. 221), giving to any telegraph company the right to construct, etc., telegraph lines on the public lands of the United States, etc., upon evidence of acceptance of its terms under specified restrictions, etc., is a regulation of commerce within the meaning of that clause of the United States Constitution which declares that congress has power to "regulate commerce, etc., among the several States," and supersedes State legislation upon the subject. *Western Union Tel. Co.* v. *Atlantic, etc., Tel. Co.*, 5 Nev. 102.

§ 4. **Construction of line.** By general statutes in most of the States of the United States and in Canada and England, telegraph companies are authorized to construct their lines upon and along, and in England, under (see *So. East. R. R. Co.* v. *European Amer. Elec. Tel. Co.*, 9 Exch. 363; S. C., Q. C., L. R. 467; 23 L. J. Exch. 113), any public road or highway, and across navigable streams, so as not to interfere with the public use of either. But the telegraph companies have no

right to incommode the public travel by their erections; and if they do so, or if having made erections within the limits of a highway in conformity with their charter, they suffer the same to get down or out of repair, and to remain so after reasonable notice and opportunity to repair them, so as to obstruct the public travel, and endanger the safety of travelers rightfully traveling within any portion of the highway and one is injured thereby, the telegraph companies are liable to respond in damages for the injury. *Dickey* v. *Maine Tel. Co.*, 46 Me. 483; *Rex* v. *United Kingdom Tel. Co.*, 9 Cox's C. C. 137. See, too, *Young* v. *Inhabitants of Yarmouth*, 9 Gray, 386. The fact that a telegraph line crossing a highway is allowed to swing down so low as to obstruct ordinary travel is some evidence of negligence on the part of the telegraph company, and, in the absence of any thing to explain it, will warrant a verdict against them for damages for injuries sustained by one, who, using due care, is thrown from his vehicle by means of the wire. *Thomas* v. *Western Union Tel. Co.*, 100 Mass. 156.

In some of the States, express authority is given to telegraph companies to erect their posts and to establish their lines along and upon the bed of railways, but in such a manner as not to prejudice the rights of railway companies, license first being had of such railroad company, by vote of the board of directors, or consent of the superintendent.

Congress has the constitutional power to pass an act giving to telegraph companies organized under State laws the right to construct and use lines of telegraph along any of the military or post roads of the United States. And an act of a State legislature which purports to give the exclusive right to a telegraph company, incorporated by it, to erect and use lines of telegraph within certain counties of the State, is in conflict with the act of congress of July 22, 1866, and is null and void. *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 2 Woods, 643; affirmed, 96 U. S. (6 Otto) 1. Where a ship's anchor got entangled with an electric cable and the cable was cut by order of the master, it was held that under the circumstances, the master was guilty of a want of nautical skill. *The Clara Killam*, 39 L. J. Adm. 50; S. C., 3 L. R. Adm. 161; 19 W. R. 25; 23 L. T. (N. S.) 27.

On the trial of an action against a telegraph company, for negligence in permitting telegraph poles to fall and suspend the wires across a highway, where a question is raised as to the soundness of the poles, it is error to admit evidence of the condition of other poles forty or sixty rods away, without any evidence to show that they were of the same kind, put up at the same time and equally exposed. *Western Union Tel. Co.* v. *Levi*, 47 Ind. 552. If a telegraph company, engaged in constructing its line through a public and frequented street of a city,

allows its wire to remain suspended across the street in a manner which obstructs travel, without guards, flags, or other notice to the public of the obstruction, it is guilty of gross negligence. *Western Union Tel. Co.* v. *Eyser*, 2 Col. T. 141.

Telegraph cables so laid or suspended in navigable waters as to catch upon the keels, or to come in contact with vessels navigating the stream, and which but for such cables could pass without difficulty or interruption, are improperly placed, and injuriously interrupt navigation. *Blanchard* v. *Western Union Tel. Co.*, 60 N. Y. (15 Sick.) 510; S. C., 67 Barb. 228; 3 N. Y. Sup. Ct. (T. & C.) 775.

For further authorities regarding the negligent construction of telegraph lines, see Vol. 4, chapter on *Negligence*.

## ARTICLE II.

### POWERS, DUTIES AND LIABILITIES.

**Section 1. Contracts as to messages.** The obligation of a telegraph company to use due care and skill arises entirely out of contract. *Playford* v. *Unit. King. Tel. Co.*, 10 B. & S. 759; L. R., 4 Q. B. 706. And the contract for the transmission of a telegraphic message is not necessarily made with the person to whom it is sent. If the person to whom it is addressed is the one interested in its correct and diligent transmission, and by whom the expense of sending it is borne, he will be regarded as the one with whom the contract is made. The business of telegraph companies, with that of common carriers, is in the nature of a public employment, as they hold out to the public that they are ready and willing to transmit intelligence for any one upon the payment of their charges, and not for particular persons only. *De Rutte* v. *The New York, Albany & Buffalo Electric Magnetic Tel. Co.*, 1 Daly, 547; S. C., 30 How. 403. And when a telegraph company furnishes its customers printed blanks containing the terms upon which it proposes to transmit messages, a delivery to the company for transmission of a message written upon one of such blanks is an acceptance of the terms and constitutes a contract between the parties. *Young* v. *The Western Union Tel. Co.*, 65 N. Y. (20 Sick.) 163; affirming S. C., 2 Jones & Sp. 390; *Grinnell* v. *Western Union Tel. Co.*, 113 Mass. 299; *Passmore* v. *Western Union Tel. Co.*, 78 Penn. St. 238; *Aiken* v. *Western Union Tel. Co.*, 5 So. Car. 358. And for a still stronger reason when a person writes a message under a printed notice requesting the company to send the message "subject to the above conditions and the agreement indorsed on back," signs it, and delivers it

for transmission, he accepts the conditions, and the contract between him and the company is upon such terms and conditions. *Western Union Tel. Co.* v. *Carew*, 15 Mich. 525; *Breese* v. *United States, etc., Co.*, 45 Barb. 274; 31 How. 87; 48 N. Y. (3 Sick.) 133. And a condition prescribed by a telegraph company, and printed in their blank form, that they will not be liable for damages if the claim is not presented in sixty days from sending the message, is binding on one sending a message on the printed form. *Wolf* v. *Western Union Tel. Co.*, 62 Penn. St. 83; *Young* v. *Western Union Tel. Co.*, 65 N. Y. (20 Sick.) 163. Express stipulations in the contract for transmission bind the receiver as well as the sender. *Aiken* v. *Tel. Co.*, 5 So. Car. 358.

§ 2. **Limiting liability by contract.** When the sender of a message writes and subscribes it upon a printed blank containing a stipulation limiting the liability of the company for any error in transmission of messages when unrepeated, this constitutes the stipulation a part of the contract between the sender and the company; and restricts any recovery for such error, unless caused by willful default or gross negligence. Proof that the sender did not read the blank, or that repeating the message would not have disclosed the error, is immaterial. *Grinnell* v. *Western Union Tel. Co.*, 113 Mass. 299; S. C., 18 Am. Rep. 485; *Passmore* v. *Western Union Tel. Co.*, 78 Penn. St. 238; S. C., 9 Phil. 90. A contract voluntarily signed and executed by a party, in the absence of misrepresentation or fraud, with full opportunity for information as to its contents, cannot be avoided upon the ground of his negligence or omission to read it, or to avail himself of such information. *Breese* v. *United States Tel. Co.*, 48 N. Y. (3 Sick.) 132; 8 Am. Rep. 526. But a regulation, designed to protect the telegraph company from responsibility for gross negligence or fraud of its agents and employees in the transmission or delivery of a message sent for a valuable consideration, is void, being unreasonable and against public policy. *Candee* v. *Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452; *True* v. *International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Western Union Tel. Co.* v. *Buchanan*, 35 Ind. 429; 9 Am. Rep. 744; *Western Union Tel. Co.* v. *Fontaine*, 53 Ga. 434. So, the printed regulations, subject to which all night messages are required to be sent, stating that the company "will receive messages to be sent during the night at one-half the usual rates, on condition that the company shall not be liable for errors or delay in the transmission or delivery, or for non-delivery of such messages, from whatever cause occurring, and shall only be bound in such case to return the amount paid by the sender," are void. *Candee* v. *Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452; *Bartlett* v. *Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437.

The stipulation is unreasonable and void as against public policy, *so far* as it undertakes to protect the company from liability for the negligence or fraud of its agents. *Hibbard* v. *Western Union Tel. Co.*, 33 Wis. 558; 14 Am. Rep. 775; *Western Union Tel. Co.* v. *Tyler*, 74 Ill. 168; 24 Am. Rep. 279. But see *Aiken* v. *Tel. Co.*, 5 So. Car. 358. It is void because its terms are repugnant, assuming to impose an obligation, and, by the same act, to release from all obligation. *Bartlett* v. *Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437. Under the Indiana statute a telegraph company cannot, by its own regulations in reference to repeating messages, absolve itself from liability for special damages for negligence. *Western Union Tel. Co.* v. *Meek*, 49 Ind. 53. One employing a telegraph is bound by the valid regulations of the company which are known to him, although he does not write his message on the printed blank containing them. *Western Union Tel. Co.* v. *Buchanan*, 35 Ind. 429; 9 Am. Rep. 744.

§ 3. **Contracts, how affected by notices.** Telegraph companies have the right to make reasonable rules for the conduct of their business, and can limit their liability for mistakes not occasioned by gross negligence or willful misconduct by notice brought home to the sender of the message, or by special contract. *Breese* v. *United States Tel. Co.*, 48 N. Y. (3 Sick.) 132; 8 Am. Rep. 526; S. C., 45 Barb. 274; *Western Union Tel. Co.* v. *Buchanan*, 35 Ind. 429; 9 Am. Rep. 744; *Wann* v. *Western, etc., Tel. Co.*, 37 Mo. 472. Such notice is but another mode of stating and showing the existence of an express contract between the parties. It is but a proposition made by the company, and the sender of the message, by acting under it without objection, or by manifesting his assent thereto in any other mode, accepts the proposition, and it thereby possesses all the ingredients of an express contract. But the notice cannot be allowed to operate so as to relieve the company from liability for mistakes arising from the negligence of their operators or agents. *Sweatland* v. *Illinois, etc., Tel. Co.*, 27 Iowa, 432; 1 Am. Rep. 285; *Western Union Tel. Co.* v. *Buchanan*, 35 Ind. 429.

§ 4. **Implied contracts.** Assuming that a message was simply written out on a blank containing no stipulations and conditions, and delivered to the company's agent together with the charges for sending the dispatch, the contract between the parties would be an implied contract, and the reasonable rules and regulations of the company, if the sender had knowledge of them, or a fair opportunity to know them, would be incorporated into the contract and bind the sender. See Vol. 1, pp. 73, 74.

§ 5. **Construction of contracts.** For telegraph companies to secure

exemption from the consequences of their own gross negligence by contract, is against public policy to permit. Notwithstanding any special conditions which may be contained in a contract restricting their liability in case of an inaccurate transmission of the message, the company will still be liable for mistakes happening by their own fault, such as defective instruments, or carelessness, or unskillfulness of their operators, but not for mistakes occasioned by uncontrollable causes. And in an action to recover damages resulting therefrom, the company, to exonerate themselves, must show how the mistake occurred. In the absence of any proof on their part in that regard, the jury must presume a want of ordinary care on the part of the company. *Tyler* v. *Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38. See *Grinnell* v. *Western Union Tel. Co.*, 113 Mass. 299; *Bartlett* v. *Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437; *Western Union Tel. Co.* v. *Graham*, 1 Col. T. 230; 9 Am. Rep. 136; *Western Union Tel. Co.* v. *Buchanan*, 35 Ind. 429; *Western Union Tel. Co.* v. *Tyler*, 74 Ill. 168; 24 Am. Rep. 279.

In an action to recover the amount of losses sustained in consequence of incorrect information given by a telegraph company in violation of their contract with plaintiffs, as to the fluctuations of the gold market in New York, the defense was that the error in the telegram was no fault of defendants, but occurred in the working of the indicator of the Gold Stock Company, placed, for convenience, in the office of defendants in New York, but under the management of a corporation entirely distinct from theirs. It was held that this did not exonerate them from liability, because, by the contract shown, they were bound to carry to plaintiffs correct information, which they should have obtained without relying on the indicator. *Bank of New Orleans* v. *Western Union Tel. Co.*, 27 La. Ann. 49.

§ 6. **Right to make reasonable rules.** A telegraph company has authority by statutory provisions to enact reasonable rules and regulations in conformity with which it will be responsible for the transmission of messages. *Birney* v. *New York, etc., Co.*, 18 Md. 341; *Camp* v. *Western, etc., Tel. Co.*, 1 Mete. (Ky.) 164; *McAndrew* v. *Elec. Tel. Co.*, 33 Eng. L. & Eq. 180. But this authority is restricted to such regulations as are needful to guard them against the errors and miscarriages which are incident to the nature of the business. It does not extend so far as to enable them to shelter themselves from responsibility for losses due to the negligence of their servants. *Western Union Tel. Co.* v. *Graham*, 1 Col. T. 230; 9 Am. Rep. 136; *Western Union Tel. Co.* v. *Buchanan*, 35 Ind. 429. According to the weight of authority, a regulation that the liability of the company for any mistake

or delay in the transmission or delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except willful misconduct or gross negligence on the part of the company. *Breese* v. *United States Tel. Co.*, 48 N. Y. (3 Sick.) 132; S. C., 8 Am. Rep. 526; *Grinnell* v. *Western Union Tel. Co.*, 78 Penn. St. 238; *Western Union Tel. Co.* v. *Carew*, 15 Mich. 525. But it has been held that the requirement that a message shall be repeated is void as against public policy, as the law requires the message to be correctly sent without such repetition. *Western Union Co.* v. *Tyler*, 74 Ill. 168; 24 Am. Rep. 279. See *ante*, p. 3, § 2. So, too, the provision, "that the company will not be liable for damages in any case unless a claim therefor should be presented in writing within sixty days after sending the message," is reasonable. *Young* v. *Western Union Tel. Co.*, 65 N.Y. (20 Sick.) 163. So is a regulation that in case of messages received by it for transmission over its own line and then over other lines beyond, it will not be responsible for errors occurring on such other lines. *Western Union Tel. Co.* v. *Carew*, 15 Mich. 525. And it *seems*, that a telegraph company being authorized by law thus to make rules for the government of its transactions, any one employing the company will be supposed to be aware of such regulations, and will be presumed to have engrafted them upon his contract, and no proof of their having been actually brought home to his knowledge will be required. *Birney* v. *New York, etc., Co.*, 18 Md. 341. So, too, although a notice that the company will not be responsible for errors occurring on other lines does not state where the company's line terminates, a sender of a message is put upon inquiry, and he cannot claim damages for errors occurring on another line on the ground that he did not know that the defendant's line did not extend to the point of destination of his message. *Western Union Tel. Co.* v. *Carew*, 15 Mich. 525.

But, as we have said, the right of a telegraph company to limit its liability by rules of its own does not extend so far as to enable them to shelter themselves from responsibility for losses due to the negligence of their servants. *Western Union Telegraph Co.* v. *Fontaine*, 58 Ga. 433. Thus, if a message was received at the further office of the company, the fact that the sender did not pay to have it repeated can-

not be any defense to an action for a failure to deliver it to the person to whom it was addressed. *Western Union Telegraph Co.* v. *Graham*, 1 Col. T. 230; 9 Am. Rep. 136. Nor are they exempt from liability for the ignorance of their employee of a well-known town to which a message is addressed. *Western Union Telegraph Co.* v. *Buchanan*, 35 Ind. 429.

§ 7. **To decline sending messages.** A telegraph company may decline the transmission of all messages of an illegal or immoral character, or such as are in furtherance of fraud, or against public policy; or where the message is for the purpose of aiding or concealing crime, or would in any other way tend to thwart the course of public justice. In some States the transmission of such messages is, by statute, made a criminal offense. And the company may refuse to send a message if it is so obscurely written that the operator had doubts as to its exact meaning. *N. Y. & Wash. Prin. Tel. Co.* v. *Dryburg*, 35 Penn. St. 298.

§ 8. **To withhold messages.** A telegraph company may withhold the delivery of any message transmitted over its line, if the one to whom the message is sent refuses to pay therefor and the message was not prepaid. The company certainly has a right to make the payment for the transmission of a message a condition precedent to its delivery. Scott & Jarn., §§ 109, 120.

§ 9. **Requiring messages to be sent.** There is no obligation resting on a person sending a telegraphic message to select the longest or the shortest line. He may consult his own interest or choice in such a matter, and he incurs no responsibility to any one, unless he has entered into a contract to forward all such messages on a particular line. There are several things which recommend telegraph lines. The machinery should be kept in proper order; strict attention should be given to the transmission of messages, and competent persons engaged in the office. When there is much competition, great energy is required, and if this be wanting, success may not be expected. *Western Tel. Co.* v. *Penniman*, 21 How. (U. S.) 460; *Same* v. *Magnetic Tel. Co.*, id. 456. Hence, it seems to be quite clear that a telegraph company *may* offer great and peculiar advantages, and thereby *persuade* individuals or other companies to give it custom; but it cannot *compel* any individual or any company, however despicable and obscure, to use its line as a vehicle to convey an idea, although that idea be an entirely worthless one. Ib.

§ 10. **General duties to the public.** A telegraph company, holding itself out to the public as ready and willing to transmit messages, pledges to the public the use of instruments proper for the purpose, and that degree of skill and care adequate to accomplish the object proposed,

and, in case of failure in any of these respects, is undoubtedly liable for the damage resulting. *Bartlett* v. *Western Union Tel. Co.*, 62 Me. 209, 221; 16 Am. Rep. 437. But it would not be liable for causes not within its control, i. e., failure of the electrical current, irregularities in its power or efficiency, interruptions or confusions arising from storm and wind, heat or cold, nor for imperfections in the working of the wire arising from necessary imperfection or inherent characteristics in the metals or other things necessarily pertaining to the business of communicating by telegraph, or the machinery, or appliances invented and approved for the purpose. It performs its duty by putting in operation, for the benefit of the sender, the facilities which this new art affords, with all the liabilities of failure or inaccuracy which belong to the science in its present stage of development, or result from causes otherwise beyond human control. Opinion of WOODRUFF, J., dissenting only on the question of proper measure of damages, in *Leonard* v. *The New York, etc., Tel. Co.*, 41 N. Y. (2 Hand) 544, 577; 1 Am. Rep. 446.

The analogy between common carriers of goods and common carriers of messages is not perfect, and their responsibility differs in a manner corresponding to the difference in the nature of the services they perform. *Aiken* v. *Tel. Co.*, 5 So. Car. 358; *Leonard* v. *N. Y., etc., Tel. Co.*, 41 N. Y. (2 Hand) 544; 6 Am. Rep. 140; *Western Union Tel. Co.* v. *Fontaine*, 58 Ga. 433.

A telegraph company may be held liable for damages caused by the transmission of a fraudulent message purporting to give authority to make drafts upon a bank, where the circumstances attending the request to transmit the message are such as to give the operator reason to suspect the fraud. *Elwood* v. *Western Union Tel. Co.*, 45 N. Y. (6 Hand) 549.

§ 11. **Liabilities for torts.** A telegraph company is liable *ex delicto* for an injury done by its agents or servants to third persons; for misfeasances as well as for non-feasances. *Dryburg* v. *N. Y. & Wash. Prin. Tel. Co.*, 35 Penn. St. 298; *Birney* v. *N. Y. & Wash. Prin. Tel. Co.*, 18 Md. 341. The same principles govern as to its liability to its agents and servants, as govern other masters and servants. In some countries, especially in England, their liability for tort is fixed by statute. In fact their liability *ex delicto* is not different from that of individuals and other corporations, unless by statute a different rule obtains.

§ 12. **Liability for not sending message.** While telegraph companies are not insurers, and do not guarantee the delivery of all messages with entire accuracy, and against all contingencies, they do under-

take for ordinary care and vigilance in the performance of their duties, and to answer for the neglect and omission of duty of their servants and agents. The nature of the business is suggestive of many risks and contingencies to which no other business or agency is subject. The electric current may be interrupted, and the current broken without fault of the corporation, so as to obstruct telegraphic communication, and words of different signification may be represented by characters so similar that errors in transcribing may occur without fault on the part of the person transcribing, or technical terms may be used not easily expressed by telegraphy, and in which errors may occur without fault. These, and risks of the like character, are upon the person sending the message, unless he elects to comply with the terms of the company, and have the dispatch repeated, by which certain risks are guarded against and certain errors prevented or insured against. But an error in transcribing the direction, and consequent mis-delivery, are presumptive evidence of neglect and want of care in the operator, and cast the burden upon the company of explaining the error and showing that it occurred without fault, if the message is received for transmission unconditionally. *Baldwin* v. *United States Tel. Co.*, 45 N. Y. (6 Hand) 744; 6 Am. Rep. 165; S. C., 54 Barb. 515; 1 Lans. 125; 6 Abb. (N. S.) 405; *Bryant* v. *Am. Tel. Co.*, 1 Daly, 575.

Telegraphic messages sent in cipher, the purport of which is entirely unknown to the officers or agents of the company, fall within that principle of the law of common carriers which exempts the carrier from responsibility on the ground of concealment by the owner of the goods in respect to their amount, nature and value. *Candee* v. *Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452. But in every case it is incumbent upon the company to disclose *some reason* for the failure to deliver a message, or it is chargeable with gross negligence. As where a message was sent by plaintiff's line from Harrisburgh to New York, but the message did not get beyond Philadelphia, the company showing no sufficient reason therefor, they were held liable as for gross negligence. *United States Tel. Co.* v. *Wenger*, 55 Penn. St. 262. See *Sprague* v. *Western Union Tel. Co.*, 6 Daly, 200.

In an action against a telegraph company to recover the Indiana statutory penalty for failure to transmit a message from an office in that State to an office in another State, the fact that the act of negligence which prevented the message from reaching its destination occurred out of this State will not defeat a recovery. *Western Union Tel. Co.* v. *Hamilton*, 50 Ind. 181.

§ 13. **Liability for delay in sending.** If a telegraph company dispatch a message in due course and with the ordinary care to secure

its safe and correct transmission, and are guilty of no negligence in regard to its delivery to the person to whom it is addressed, the obligation of the company is performed and the onus of proof is upon the person sending the dispatch to show affirmatively that there has been negligence or want of good faith either in dispatching the message or in regard to its delivery. *United States, etc., Co.* v. *Gildersleve*, 29 Md. 232. But if negligently they have delayed the message, either in transmitting or delivering it, they are liable for the damages caused by the delay. And if a message be delayed it is incumbent upon the company to show that they dispatched it in due course with the ordinary care to secure its safe and correct transmission, and that they were not negligent, regarding its delivery to the person to whom it is addressed. *Sprague* v. *Western Union Tel. Co.*, 6 Duer, 200.

Where a person asks an agent of a telegraph company at its office whether the message "come by the night train" can be sent immediately, and is informed that it can, and he pays the charges demanded, and the sending of the message is postponed to the next morning when it is too late to transmit it, he can recover the statutory penalty unless the company shows that the message could not be sent by reason of some derangement of the wires, or was postponed in consequence of the transmission of intelligence of general and public interest, or communications for and from officers of justice. *Western Union Tel. Co.* v. *Ward*, 23 Ind. 377.

It is made the duty of telegraph companies by statute in England, Canada, the United States and in many of the States to give preference to government dispatches, in the transmission over their lines. And in many of the American States, by statute, a preference is given also to intelligence of general and public interest, such as "press dispatches," over private messages, it is also provided that an arrangement may be made with the proprietors or publishers of newspapers, for the transmission, for the purpose of publication of intelligence of general and public interest, out of its order. If delay occurs in the transmission of private messages solely on account of the proper discharge of these duties, the telegraph companies are not responsible for the damages resulting therefrom.

§ 14. **Liability for errors.** The liability of a telegraph company for error or failure in the transmission of a dispatch is quite unlike that of a common carrier. A telegraph company is intrusted with nothing but an order or message, which is not to be carried in the form in which it is received, but is to be transmitted or repeated by electricity, and is peculiarly liable to mistake; which cannot be the subject of embezzlement; which is of no intrinsic value; the importance of which

cannot be estimated except by the sender, nor ordinarily disclosed by him without danger of defeating his own purposes; which may be wholly valueless, if not forwarded immediately; for the transmission of which there must be a simple rate of compensation; and the measure of damage for a failure to transmit or deliver which has no relation to any value which can be put on the message itself. *Grinnell* v. *Western Union Tel. Co.*, 113 Mass. 299. See *Leonard* v. *New York, etc., Tel. Co.*, 41 N. Y. (2 Hand) 544; 1 Am. Rep. 446.

In an action to recover damages of a telegraph company for an error in the transmission of a message, in the absence of any rule or contract fixing the measure of liability, the plaintiff makes out a *prima facie* case by proof of the undertaking, error, and damage, and throws the burden upon the company to show that the error was caused by some agency for which it is not liable. *Bartlett* v. *Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 737; *Turner* v. *Hawkeye Tel. Co.*, 41 Iowa, 458; 20 Am. Rep. 605. And where the terms of a message sent by telegraph are seriously changed, and the name of the sender entirely disfigured, either by the transmission or the copying, it will import negligence on its face. *Western Union Tel. Co.* v. *Meek*, 49 Ind. 53.

When a telegraph company contracts to deliver market reports, it binds itself to procure and furnish correct reports, and is responsible for the loss occasioned by any mistake in them. *Turner* v. *Hawkeye Tel. Co.*, 41 Iowa, 458; 20 Am. Rep. 605; *Bank of New Orleans* v. *Western Union Tel. Co.*, 27 La. Ann. 49.

§ 15. **Liability beyond line.** Each of two or more telegraph companies whose lines connect and form a continuous line over which a message is sent, in the absence of evidence of a special agreement or arrangement, either with the sender of the message, or between each other, will be liable for its own acts, but not for the acts and defaults of the other. *Baldwin* v. *The United States Tel. Co.*, 45 N. Y. (6 Hand) 744; S. C., 6 Am. Rep. 165; reversing S. C., 54 Barb. 505; 1 Lans. 125; 6 Abb. (N. Y.) Pr. (N. S.) 405; *Squires* v. *Western Union Tel. Co.*, 98 Mass. 232. But it would seem that when a telegraphic company is paid for the transmission of a message to a place beyond their own lines, with which they are in communication by the agency of other companies, they must in such a case be regarded as undertaking that the message will be transmitted and delivered at that place. And they might be held liable, as under a special agreement or arrangement with the sender, for the default of other connecting companies, when such connecting companies would not be liable for the default of such first company. *De Rutte* v. *The New York, etc., Tel. Co.*, 1 Daly, 547; S. C., 30 How. 403.

When a telegraph company from a point beyond its line receives from another company a message to transmit over its line, if there is error in the message and a loss results, the company has it in its power to prove, and it must prove, in order to release itself from liability for the error, that the message delivered by them to the plaintiff was the same one that was received from the other line. *La Grange* v. *Southwestern Tel. Co.*, 25 La. Ann. 383; *Turner* v. *Hawkeye Tel. Co.*, 41 Iowa, 458; 20 Am. Rep. 605.

The regulations of a telegraph company, that in the case of messages received by it for transmission over its own line and then over other lines beyond, it will not be responsible for errors occurring on such other lines, are reasonable. And although the notice of such regulations does not state where the company's line terminates, a sender of a message is put upon inquiry, and he cannot claim damages for errors occurring on another line, on the ground that he did not know that the defendants' line did not extend to the point of destination of his message. *Western Union Tel. Co.* v. *Carew*, 15 Mich. 525.

§ 16. **Liability under statutes.** Where the amount which a telegraph company shall pay as a penalty for a failure to comply with requirements of law is fixed by statute, the company cannot change the degree or measure of the statutory liability by the adoption of rules and regulations, nor will paying back the amount paid for sending a dispatch, and acceptance of the same (unless it is agreed to be accepted in full of all that a party has a right to recover by virtue of the statute), bar an action for the full penalty. *Western Union Tel. Co.* v. *Buchanan*, 35 Ind. 429; 9 Am. Rep. 744.

An action to recover a penalty given by the New York statute for neglecting or refusing to send a dispatch by telegraph, can be maintained by the party who desires to send the same and is refused, and if it be a telegraph company that desires another telegraph company to receive and forward a message, the company so desiring the dispatch to be sent may properly sue for the penalty in case of refusal, and this, notwithstanding the blank upon which the telegram was written contains a notice as follows: "Nor shall this company be held liable for any error or neglect by any other company over whose lines this message may be sent. *United States Tel. Co.* v. *Western Union Tel. Co.*, 56 Barb. 46.

§ 17. **Rival companies.** A telegraph company secured the right to transmit telegrams under Morse's patent from Baltimore to Wheeling with branches to Washington and Pittsburg. Another company had such right under the same patent from Pttsburg to Philadelphia, and still another had such right from Harrisburg to Baltimore. It was

held that the transmission of telegrams by the last-mentioned line from Pittsburg to Baltimore was no injury to the first-mentioned line for which there was a legal remedy. *Western Tel. Co.* v. *Magnetic Tel. Co.*, 21 How. (U. S.) 456; *Same* v. *Penniman*, id. 460.

§ 18. **Contracts by telegraph.** Contracts may be made by telegraph as well as by letter or other writing. Vol. 1, pp. 87, 88; *Wells* v. *Milwaukee, etc., R. R. Co.*, 30 Wis. 605; *Utley* v. *Donaldson*, 4 Otto, 29; *Minnesota Oil Co.* v. *Collier Land Co.*, 4 Dill. 431.

## ARTICLE III.

### REMEDIES.

**Section 1. Who may sue.** There is sufficient privity of contract between the receiver of a message by telegraph and the company to enable the former to maintain an action against the latter for negligence, although the price of transmission was paid by the sender. *Aiken* v. *Tel. Co.*, 5 So. Car. 358; *New York, etc., Tel. Co.* v. *Dryburg*, 35 Penn. St. 298. They are not excused from liability to third persons for damages sustained by the negligent transmission of an erroneous message by the fact that the sender did not pay for its being repeated back, in accordance with a rule of the company whereby they limited their responsibility to the correct transmission of messages that should be repeated back. Especially where the mistake consisted in transmitting a different message from the one ordered. *New York, etc., Tel. Co.* v. *Dryburg*, 35 Penn. St. 298. But in England it has been held that an action is not maintainable by the receiver of a telegram for a mistake in it which has occasioned him damage, the right of action is in the sender. *Playford* v. *Unit. King. Tel. Co.*, L. R., 4 Q. B. 706; 10 B. & S. 759; 17 L. T. (N. S.) 243; S. C., 16 W. R. 219, Q. B.; 17 W. R. 968; 38 L. J. Q. B. 249. See, too, *Dickson* v. *Reuter's Tel. Co.*, 2 L. R., C. P. Div. 62; S. C. affirmed, 37 L. T. (N. S.) 370.

But where the plaintiff, a broker, received an order by telegraph from an employer to sell five thousand barrels of petroleum to be delivered at a future day, and the order was executed, the plaintiff disclosing his principal, and it then appeared that the order as sent by the employer was for only five hundred barrels, the error being made in its transmission by telegraph, it was held that the plaintiff, not being liable upon the contract of sale, could not maintain the action against the telegraph company for loss in the settlement of the contract caused by the error. *Rose* v. *United States, etc., Tel. Co.*, 6 Rob. (N. Y.) 305. The principal could and should have been made plaintiff, although the

telegram had been sent by another than himself having authority from him to make such orders. *United States, etc., Co.* v. *Gildersleve*, 29 Md. 232.

In an action brought in Indiana against a telegraph company, to recover damages for negligence in failing to deliver within a reasonable time, a telegram directed from a place without the State to the plaintiff at a place within the State, because of which negligence the plaintiff failed to obtain employment as a steamboat pilot at certain wages per month, for a trip, and if he suited, for the season, he not obtaining employment for sometime thereafter, and the sender of said message not acting as plaintiff's agent in sending it under the statute, the plaintiff may recover though the relation of contractors did not exist between him and the telegraph company, and the damages sought by the action are not remote or speculative. *Western Union Tel. Co.* v. *Fenton*, 52 Ind. 1.

§ 2. **Who may be sued.** As to the proper party to sue no question can be raised, unless there be connecting lines over which the message is sent. In such case in the absence of a special agreement or arrangement either with the sender of the message or between the connecting lines, the company on whose line the default resulting in the loss occurs is the proper party to be sued. *Baldwin* v. *The United States, etc., Tel. Co.*, 45 N. Y. (6 Hand) 744; S. C., 6 Am. Rep. 165. But where a telegraph company receives the entire compensation for transmitting a message to a point far beyond the terminus of its line, without communicating by what lines other than its own it would be sent, or any other particulars as to the mode or manner of its transmission, and nothing is said about the company being answerable only for the correct transmission of the message along its own line, if the message is correctly sent over its line, but an important mistake is made thereafter on one of the connecting lines, the first company is answerable for the error, and it or the company on whose line the mistake occurred may properly be made the party defendant. *DeRutte* v. *N. Y., etc., Tel. Co.*, 1 Daly, 547; S. C., 30 How. 403.

§ 3. **Injunction.** An injunction will not be granted upon the application of a telegraph company to prevent a rival line from transmitting messages between two points, although the company allege that *its* line is the shorter route, and the more direct of the two. *The Western Tel. Co.* v. *Pennimann*, 21 How. (U. S.) 460. For rules of law applicable under this head, see chapter on *Corporations*, pp. 304–352 of Vol. 2, and the chapter on *Injunctions*, Vol. 3, pp. 680–774. Where a complainant seeking an injunction omits from his bill material facts in regard to which he had knowledge, or was put upon the inquiry, and

had the means of ascertaining, and ought to have ascertained them before instituting the proceedings, such omission is in itself a sufficient ground to disentitle him to the summary process of the court. *Sprigg* v. *Western Tel. Co.*, 46 Md. 67.

§ 4. **Damages.** Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the non-performance of contracts, whether for the sale or carriage of goods, or for the delivery of messages, by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in contemplation of both, at the time of making the contract, as a contingency that might follow the non-performance. In other words, the damages given by way of indemnity have been the natural and necessary consequences of the breach of contract, in the minds of the parties, interpreting the contract in the light of the circumstances under which, and the knowledge of the parties of the purposes for which it was made, and when a special purpose is intended by one party, but is not known to the other, such special purpose will not be taken into account in the assessment of damages for the breach. The damages in such cases will be limited to those resulting from the ordinary and obvious purpose of the contract. *Baldwin* v. *U. S. Tel. Co.*, 45 N. Y. (6 Hand) 744, 750; 6 Am. Rep. 165; *Bartlett* v. *Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437; *Cory* v. *Thames Iron Works*, L. R., 3 Q. B. 181; *Hadley* v. *Baxendale*, 9 Exch. 341; *U. S. Tel. Co.* v. *Wenger*, 55 Penn. St. 262; *Manville* v. *Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8; *Tyler* v. *Western Union Tel. Co.*, 60 Ill. 421; 14 Am. Rep. 38; *U. S. Tel. Co.* v. *Gildersleve*, 29 Md. 232. See, too, *Sprague* v. *Western Union Tel. Co.*, 6 Daly, 200. So in an action for the non-delivery of a telegraph message ordering goods, the plaintiff may recover the money paid for transmitting the message, any advance in freight, and any expenses incurred in consequence of the failure of the message, but he cannot recover contingent or anticipated profits. *Western Union Tel. Co.* v. *Graham*, 1 Col. T. 230; 9 Am. Rep. 136. And where the import of a telegraphic message is wholly unknown to the company's agent to whom the same is delivered for transportation, it cannot be assumed that he had in view any pecuniary loss as the natural or probable result of a failure to send such message; and in such case, upon a breach of the contract to transmit and deliver, the sender can recover only nominal damages, or the amount paid for sending the message. *Candee* v. *Western Union Tel. Co.*, 34 Wis. 471; 17 Am. Rep. 452; *Beaupré* v. *Pac., etc., Tel. Co.*, 21 Minn. 155; S. C., 24 W. R. 949; 45 L. J. C. P. Div. 682; 1 L. R. Com. Pleas

Div. 326; 17 Eng. Rep. 286; *Saunders* v. *Stewart*, 35 L. T. (N. S.) 370.

In an action against a telegraph company for damages for the delivery of an incorrect market report, by reason of which the plaintiff was induced to purchase a quantity of grain to fill a contract for future delivery, the measure of damages was the difference between the actual purchase-price and the price as represented in the report. *Turner* v. *Hawkeye Tel. Co.*, 41 Iowa, 458; 20 Am. Rep. 605. And see *Bank of New Orleans* v. *Western Union Tel. Co.*, 27 La. Ann. 49. And where a message, ordering a cargo of corn to be shipped, was sent but not delivered, and the sender consequently failed to obtain the corn at the terms previously offered, the measure of damages was the difference between the price offered and that which the sender would have been obliged to pay at the same place, in order, by due diligence, after notice of the failure of the telegram, to purchase the like quality and quantity of corn, with the same rule as to freight. *True* v. *International Tel. Co.*, 60 Me. 9; 11 Am. Rep. 156; *Squire* v. *Western Union, etc., Co.*, 98 Mass. 232. And see *Rittenhouse* v. *Independent Line of Telegraph*, 44 N. Y. (5 Hand) 263; 1 Daly, 474. And in an action to recover for the loss sustained by reason of an error in transmitting a telegram, whereby more and different merchandise was sent than was ordered, the difference between the market value of the merchandise at the place from which it was sent and what it sold for at the place to which it was sent, together with the expense of transportation from the former to the latter place, was held to be no improper measure of damages. *Leonard* v. *The N. Y., etc., Tel. Co.*, 41 N. Y. (2 Hand) 544; 1 Am. Rep. 446.

Where a telegram was sent by defendant's line to plaintiff, asking for $500, and by the negligence of defendant's employees the message was changed to $5,000, which sum plaintiff sent to the sender of the message, who, upon receipt, appropriated it to his own use and absconded, it was held that defendant's negligence was not the proximate cause of the loss, as the embezzlement did not naturally result therefrom, and could not reasonably have been expected. *Lowery* v. *The Western Union Tel. Co.*, 60 N. Y. (15 Sick.) 198; S. C., 19 Am. Rep. 154.

Finally, a telegraph company cannot be exculpated from damages by showing that its line of telegraph was in good order, that approved instruments were used, and that faithful and competent servants were employed, if the particular act complained of shows negligence in the performance of duty. *Western Union Tel. Co.* v. *Meek*, 49 Ind. 53.

# CHAPTER CXXVI.

## TRADE-MARKS.

### ARTICLE I.

#### OF TRADE-MARKS IN GENERAL.

**Section 1. Definition and nature.** A trade-mark is the name, symbol, figure, letter, form or device adopted and used by a manufacturer or merchant, in order to designate the goods that he manufactures or sells, and distinguish them from those manufactured or sold by another, to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry or enterprise. Upton's Law of Trade-marks, 99; *Newman* v. *Alvord*, 51 N. Y. (6 Sick.) 189; 10 Am. Rep. 588; *Ferguson* v. *Davol Mills*, 7 Phila. (Penn.) 253; S. C., 2 Brewster, 314. It must be used to indicate, not the quality, but the origin or ownership of the article to which it is attached. It may be any sign, mark, symbol, word or words, which others have not an equal right to employ for the same purpose. *Newman* v. *Alvord*, 51 N. Y. (6 Sick.) 189; *Osgood* v. *Allen*, 1 Holmes, 185; S. C., 6 Am. L. T. 20. It is essential to the idea of a trade-mark, by which any particular manufactured article is desig, nated, that the mark should be annexed to, or stamped, printed, carved- or engraved upon, the article, as the same is offered for sale, and if the article has not been thus distinguished, its manufacturer cannot be said to have appropriated any particular trade-mark. *St. Louis Piano Manuf. Co.* v. *Merkel*, 1 Mo. App. 305; *Candee* v. *Deere*, 54 Ill. 439; 5 Am. Rep. 125. The trade-mark must, as the terms import, be one consisting of a word, an expression, a device, or a mark invented or adopted by the owner, which designates and distinguishes his production from the general manufacture of the same article, and it cannot be the appropriation of words belonging to the general public, which describes truly a known product. *Helmbold* v. *Helmbold Manuf. Co.*, 53 How. (N. Y.) Pr. 453; *Delaware & Hudson Canal Co.* v. *Clark*, 13 Wall. 311; *Osgood* v. *Allen*, 1 Holmes, 185; S. C., 6 Am. L. T. 20.

A mere general description, by words in common use, of a kind of

article, or of its nature and qualities, cannot of itself be the subject of a trade-mark. *Gilman* v. *Hunnewell*, 122 Mass. 139, 148.

A property exists in the use of a trade-mark which, though of a very peculiar nature, is sufficient to support an action, or to maintain an injunction. That manufacturer who has originally stamped his goods with a particular brand has a property in his mark at law and can sustain an action for damages for the use of it by another. And courts of equity will restrain the use of it by another. *Hall* v. *Barrows*, 8 L. T. (N. S.) 227; S. C., 11 Weekly R. 525; 9 Jur. (N. S.) 483; 32 Law J. (N. S.) Ch. 548; 1 New R. 543; on appeal, 4 DeG. J. & S. 150; 9 L. T. (N. S.) 561; 12 Weekly R. 322; 10 Jur. (N. S.) 55; 33 Law J. (N. S.) Ch. 204; *Curtis* v. *Bryan*, 2 Daly (N. Y.), 312; S. C., 36 How. Pr. 33; *Winson* v. *Clyde*; *Stetson* v. *Winsor*, 9 Phil. (Penn.) 513. This property has very little analogy to that which exists in copyrights or patents for inventions. In all cases where rights to the exclusive use of a trade-mark are invaded, the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as of those of another. It is only when this false representation is directly or indirectly made, that a party who appeals to a court of equity can have relief. *Osgood* v. *Allen*, 1 Holmes, 185; S. C., 6 Am. L. T. 20; *Taylor* v. *Carpenter*, 2 Sandf. (N. Y.) Ch. 603; S. C., 11 Paige, 292. The right of property in a trade-mark is not limited, in its enjoyment, by territorial bounds, but may be asserted and maintained wherever the common law affords remedies for wrongs, subject only to such statutory regulations as may be properly made concerning the use and enjoyment of other property. *Derringer* v. *Plate*, 29 Cal. 293. And in order to protect it, it is not necessary that the plaintiff should be either the discoverer or first manufacturer of the article for which he claims the mark. *Wolf* v. *Barnett*, 24 La. Ann. 97; 13 Am. Rep. 111; *Partridge* v. *Menck*, 2 Barb. Ch. 101; 5 N. Y. Leg. Obs. 94; S. C., 2 Sandf. Ch. 622; 1 How. App. Cas. 547, 558.

The leading principle of the law of trade-mark is, that the honest, skillful and industrious manufacturer or enterprising merchant who has produced or brought into the market an article of use or consumption, that has found favor with the public, and who, by affixing to it some name, mark, device or symbol which serves to distinguish it *as his*, and to distinguish it from all others, has furnished his individual guaranty and assurance of the quality and integrity of the manufacture, shall receive the first reward of his honesty, skill, industry or enterprise, and shall in no manner and to no extent be deprived of the same by another, who, to that end, appropriates and applies to his

productions the same, or a colorable imitation of the same name, mark, device or symbol, so that the public are, or may be deceived or misled into the purchase of the productions of the one, supposing them to be those of the other. *Wolfe* v. *Barnett*, 24 La. Ann. 97. To the same effect, *Wotherspoon* v. *Currie*, L. R., 5 H. L. 508; 27 L. T. (N. S.) 393; S. C., Law R., 5 Eng. & Ir. App. 508; 42 L. J. (N. S.) Ch. 130; *Blackwell* v. *Wright*, 73 N. C. 310; *Boardman* v. *Meriden Britania Co.*, 35 Conn. 402; *Croft* v. *Day*, 7 Beav. 84; *Howe* v. *Howe Machine Co.*, 50 Barb. 236, 242. The later cases hold that this interference of courts of equity is founded mainly upon the theory of preventing frauds upon the public, rather than upon that of protection to the owner of trade-marks. The plaintiff need not have the exclusive right to the use of the trade-mark. It is sufficient if his right is exclusive as against the defendant. The defendant shall not be permitted, by the adoption of a trade-mark which is untrue and deceptive, to sell his own goods as the goods of the plaintiff, thus injuring the plaintiff and defrauding the public. *Newman* v. *Alvord*, 51 N. Y. (6 Sick.) 189; 10 Am. Rep. 588; *Lee* v. *Haley*, L. R., 5 Ch. App. Cas. 155; *Wotherspoon* v. *Currie*, L. R., 5 Eng. & Ir. App. 508. The court is not bound to interfere where ordinary caution and attention will enable purchasers to discriminate between the trade-marks used by different parties. The maxim "*Vigilantibus, non dormientibus jura subveniunt*" is applied. *The Leather Cloth Company* v. *The American Leather Cloth Company*, 11 H. L. Cas. 523; *Popham* v. *Cole*, 66 N. Y. (21 Sick.) 69; 23 Am. Rep. 22; Broom's Leg. Max. 892.

A manufacturer has no right to the exclusive use of a particular colored paper or kind of paper for covering or inclosing his goods in any particular form. *Faber* v. *Faber*, 49 Barb. 357; S. C., 3 Abb. Pr. (N. S.) 115.

A party who, while he has avoided liability for the infringement of another's trade-mark, yet has adopted a course calculated to secure a portion of the good will of the other's business, will not be regarded with favor by a court of equity. *Wolfe* v. *Burke*, 56 N. Y. (11 Sick.) 115.

§ 2. **What may be a trade-mark.** The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated as designating the true origin or ownership of the goods, article or fabric to which they are affixed, but he has no right to an exclusive use of any words, letters, figures or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality. He has no right to appropriate a sign or symbol, which, from

the nature of the fact which it is used to signify, others may employ with equal truth, and therefore have an equal right to employ, for the same purpose. *Amoskeag Manuf. Co.* v. *Spear*, 2 Sandf. (N. Y.) 599; 7 N. Y. Leg. Obs. 301; *Ferguson* v. *Davol Mills*, 7 Phil. (Penn.) 253; S. C., 2 Brewst. 314; *Boardman* v. *Meriden Britania Co.*, 35 Conn. 402. A generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients or characteristics, cannot be employed as a trade-mark, and the exclusive use of it cannot be entitled to legal protection. *Delaware & Hudson Canal Co.* v. *Clark*, 13 Wall. 311; *Osgood* v. *Allen*, 1 Holmes, 185; S. C., 6 Am. L. T. 20; *Caswell* v. *Davis*, 58 N. Y. (13 Sick.) 223; 17 Am. Rep. 233. Geographical names, which point out only the place of production, cannot be appropriated exclusively so as to prevent others from using them and selling articles produced in the districts they describe under these appellations. *Osgood* v. *Allen*, 1 Holmes, 185; S. C., 6 Am. L. T. 20; *Candee* v. *Deere*, 54 Ill. 439; 5 Am. Rep. 125; *Lea* v. *Wolf*, 15 Abb. Pr. (N. S.) 1; S. C., 1 T. & C. (N. Y.) 626; 46 How. Pr. 157; modifying S. C., 13 Abb. Pr. (N. S.) 389; 46 How. 157; *Glendon Iron Co.* v. *Uhler*, 75 Penn. St. 467; 15 Am. Rep. 599; *Canal Co.* v. *Clark*, 13 Wall. 311. But rights may be acquired in the application of such names to particular articles of manufacture if the articles have acquired a reputation in the market under such name as a trade-mark. *M'Andrew* v. *Bassett*, 4 DeG. & S. 380; 10 Jurist (N. S.), 550; S. C., 33 Law J. (N. S.) Ch. 561; 12 Weekly R. 777; 10 L. T. (N. S.) 442; affirming S. C., 10 Jurist (N. S.), 492; 10 L. T. (N. S.) 65; *Radde* v. *Norman*, L. R., 14 Eq. 348; 3 Eng. Rep. 776; S. C., 41 L. J. (N. S.) Ch. 525; 26 L. T. (N. S.) 788; 20 W. R. 766; *Newman* v. *Alvord*, 51 N. Y. (6 Sick.) 189; 10 Am. Rep. 588; affirming S. C., 35 How. Pr. 108; 49 Barb. 588. A trade-mark must be so clear and well defined as to give notice to others and must not be deviated from at the suggestion of whim or caprice. It must be attached in such a way as to be reasonably durable and visible. The mere declaration of a person, however long and extensively published, that he claims property in a word as his trade-mark, cannot even tend to make it his property. It is the *actual use* of the trade-mark affixed to the merchandise of the manufacturer and this alone which can impart to it the element of property. *Candee* v. *Deere*, 54 Ill. 439; *St. Louis Piano Manuf. Co.* v. *Merkel*, 1 Mo. App. 305; *Rowley* v. *Houghton*, 2 Brewst. 303; S. C., 7 Phil. 39. Where one has established a business at a particular place, from which he has or may derive profit, and has attached to such business a name indicating to the public where it is carried on, he thereby acquires property in

the name which will be protected from invasion by a court of equity on principles analogous to those applicable in case of the invasion of a trade-mark. *Glen, etc., Manuf. Co.* v. *Hall*, 61 N. Y. (16 Sick.) 226; 19 Am. Rep. 278.

The name and address of the manufacturer combined may constitute a trade-mark which will entitle him who adopts it to protection in its exclusive use, but neither the name nor the address singly will be sufficient for protection, both must be used. *Candee* v. *Deere*, 54 Ill. 439.

A person may acquire a valid trade-mark in his own christian name as a designation of his place of business. *Standinger* v. *Standinger*, 19 Leg. Int. 85. A name has for certain purposes a commercial value. If the proprietor estimates that value and sells it to another person, to the extent and for the purposes for which he sold it, he has no right to use it. *Gillis* v. *Hall*, Cox's Am. Tel. Trade-mark Cas. 596; *Ayer* v. *Hall*, 3 Brewst. (Penn.) 509; S. C., 8 Phil. 231; 1 Leg. Gaz. 124; *Probasco* v. *Bouyon*, 1 Mo. App. 241; *Filkins* v. *Blackman*, 13 Blatchf. 440.

The following words have been upheld as trade-marks: "Dr. J. M. Lindsey's Improved Blood Searcher." *Fulton* v. *Sellers*, 4 Brewst. 42. "Brooklyn White Lead & Zinc Company." *Brooklyn White Lead Company* v. *Masury*, 25 Barb. 416. "Heroine." *Rowley* v. *Houghton*, 2 Brewst. (Penn.) 303; S. C., 7 Phil. 39. "Dr. J. Blackman's Genuine Healing Balsam." *Filkins* v. *Blackman*, 13 Blatchf. 440. "Eureka." *Ford* v. *Foster*, L. R., 7 Ch. App. 611; 3 Eng. Rep. 538; *Alleghany Fertilizer Co.* v. *Woodside*, 1 Hughes, 115. "Keystone Line." *Winsor* v. *Clyde*, 9 Phil. 513. "Sykes' Patent." *Sykes* v. *Sykes*, 3 Barn. & Cres. 541; S. C., 5 Dowl. & Ryl. 292. "Stonebreaker's Medicines." *Stonebreaker* v. *Stonebreaker*, 33 Md. 252.

The corporate name of a corporation is a trade-mark from the necessity of the thing, and upon every consideration of private justice and public policy, deserves the same consideration and protection from a court of equity. A corporate name is a necessary element of a corporation's existence, and any act which produces confusion or uncertainty concerning such name is well calculated to injuriously affect the identity and business of the corporation. *Newby* v. *Oregon Central R. R. Co.*, 1 Deady, 609; *Holmes* v. *Holmes, Booth & Atwood Manuf. Co.*, 37 Conn. 278; 9 Am. Rep. 324; *The Amoskeag Manuf. Co.* v. *Garner*, 55 Barb. 151; S. C., 6 Abb. (N. S.) 265; 4 Am. L. T. (N. S.) 176.

Whether a mere name of an article, or a designation of a place of manufacture, can or cannot become the subject of protection, as a trade-

mark, or whether the words, "Genuine" or "Yankee," can or cannot in any possible combination be used as a trade-mark, the court will restrain the use thereof in peculiar devices and labels in imitation of trade-marks used by a manufacturer to distinguish his goods, and when such use tends to deceive the public. *Williams* v. *Johnson*, 2 Bosw. 1; *Williams* v. *Spence*, 25 How. (N. Y.) Pr. 366. To the same effect, *Braham* v. *Bustard*, 9 L. T. (N. S.) 199; S. C., 1 Hem. & M. 447; 11 W. R. 1061; 2 New R. 572; *Davis* v. *Kendall*, 2 R. I. 566.

The symbol 1-2 printed in a special and unusual manner may be registered as a trade-mark, and be protected so far as to enjoin an imitator from using it printed in the like manner. *Kinney* v. *Allen*, 1 Hughes, 106; *Kinney* v. *Basch*, N. Y. Sup. Court, S. T., unreported.

Equity will protect the use of the name of a newspaper as a trade-mark from imitation or simulation which is designed as such to mislead the public. *American Grocer Publishing Assoc.* v. *Grocer Publishing Co.*, 51 How. (N. Y.) Pr. 402.

A system of numbers adopted and used by a manufacturer in order to designate goods of his make may be the subject of the same protection in equity as an ordinary trade-mark. *Ainsworth* v. *Walmsley*, L. R., 1 Eq. 518; S. C., 12 Jurist (N. S.), 205; 14 W. R. 363; 14 L. T. (N. S.) 220; 35 L. J. (N. S.) Ch. 352; *Gillott* v. *Esterbrook*, 48 N. Y. (3 Sick.) 374; affirming S. C., 47 Barb. 455; *Kinney* v. *Allen*, 1 Hughes, 106; S. C., 4 Am. L. T. (N. S.) 258.

The owner of a peculiar product of nature, like natural mineral water, who has applied to it a conventional name, by which it has become generally known, and under which it has been extensively sold by him as a useful article, is entitled to be protected in the exclusive use of such name as his trade-mark in the sale of the article. *Congress & Empire Spring Co.* v. *High Rock Congress Spring Co.*, 45 N. Y. (6 Hand) 291; S. C., 10 Abb. Pr. (N. S.) 348; reversing S. C., 57 Barb. 526.

§ 3. **What not a subject of trade-mark.** A man cannot make a trade-mark of his name to the exclusion of a like use of it by another of the same name, the use of it by the latter being fair, and unaccompanied by contrivances to deceive. *Gilman* v. *Hunnewell*, 122 Mass. 139; *Wolfe* v. *Burke*, 7 Lans. 151; S. C. reversed on another point, 56 N. Y. (11 Sick.) 115; *Burgess* v. *Burgess*, 3 DeG. M. & G. 896; S. C., 22 Law J. (N. S.) Ch. 675; 17 Eng. L. & Eq. 257; *Lazenby* v. *White*, L. J. (N. S.) Ch. 354; *Hallet* v. *Cumston*, 110 Mass. 29. Every man has the absolute right to use his own name in his own business, even though he may thereby interfere with and injure the business of another bearing the same name; provided he does not resort to any artifice, or do any act calculated to mislead the public

as to the identity of the establishments, and to produce injury to the other beyond that which results from the similarity of the names. *Meneely* v. *Meneely*, 62 N. Y. (17 Sick.) 427; S. C., 20 Am. Rep. 489; *Meriden Britania Co.* v. *Parker*, 39 Conn. 450; 12 Am. Rep. 401. When a new preparation or compound is offered for sale, a distinct and specific name must necessarily be given to it. The name thus given to it, no matter when or by whom imposed, becomes by use its proper appellation, and passes as such into one common language. Hence, all who have an equal right to manufacture and sell the article have an equal right to designate and sell it by its proper and appropriate name, the name by which alone it is distinguished and known, provided each person is careful to sell the article as prepared and manufactured by himself and not by another. When this caution is used, there is no deception of which a rival manufacturer, not even the manufacturer by whom the distinctive name was first invented or adopted, can justly complain; and so far from there being any imposition upon the public, it is the use of the distinctive name that gives to purchasers the very information which they are entitled to have. In short an exclusive right to use, on a label or other trade-mark, the appropriate name of a manufactured article, exists only in those who have an exclusive property in the article itself. *Fetridge* v. *Wells*, 13 How. (N. Y.) Pr. 385; S. C., 4 Abb. Pr. 144; *Young* v. *Macrae*, 9 Jurist (N. S.), 322; *Phalon* v. *Wright*, 5 Phil. (Penn.) 464.

It has been held that the following words and phrases could not be employed as trade-marks; "Schnapps:" *Burke* v. *Cassin*, 45 Cal. 467; 13 Am. Rep. 204; *Wolf* v. *Burke*, 7 Lans. 151; S. C. reversed on another point, 56 N. Y. (11 Sick.) 115. "Schiedam Schnapps." *Wolfe* v. *Barnett*, 24 La. Ann. 97; 13 Am. Rep. 111; *Wolfe* v. *Goulard*, 18 How. Pr. 64 "Cylinder," "Lake," "New York," "Galen." *Stokes* v. *Landgraff*, 17 Barb. 608. "Aramingo Mills." *Colladay* v. *Baird*, 4 Phil. (Penn.) 139. "Burgess's Essence of Anchovies." *Burgess* v. *Burgess*, 3 DeG. M. & G. 896; S. C., 17 Eng. L. & Eq. 257. "Thomsonian Medicines." *Thomson* v. *Winchester*, 19 Pick. 214. "Velno's Vegetable Syrup." *Canham* v. *Jones*, 2 V. & B. 218. "Night Blooming Cereus." *Phalon* v. *Wright*, 5 Phil. (Penn.) 464. "Holbrook" & "Holbrook's" generic and descriptive. *Sherwood* v. *Andrews*, 5 Am. Law Reg. (N. S.) 588. "Old London Dock Gin," nature, kind or quality. *Bininger* v. *Wattless*, 28 How. (N. Y.) Pr. 206. "Liebig's Extract of Meat," term of art to designate a well-known process. *Liebig's Extract of Meat Co.* (*Limited*) v. *Hanbury*, 17 L. T. R. (N. S.) 298. "Dessicated Codfish," descriptive of condition. *Town* v. *Stetson*, 5 Abb. Pr. (N. S.)

218; S. C. affirmed, 3 Daly, 53. "Mammoth Wardrobe." *Gray* v. *Koch*, 2 Mich. (N. P.) 119. "Nourishing Stout," quality. *Rugget* v. *Findlater*, 43 L. J. R. (N. S.) Ch. 64; S. C., 22 W. R. 53; L. R., 17 Eq. 29; 7 Eng. Rep. 653; 29 L. T. R. (N. S.) 448. "Ferro-Phosphorated Elixir of Calisaya Bark," indicative of characteristics, quality and composition. *Caswell* v. *Davis*, 58 N. Y. (13 Sick.) 223; 17 Am. Rep. 233; overruling S. C., 35 How. Pr. 76; 4 Abb. Pr. (N. S.) 6. "Gold Medal," quality and that in some competitive exhibition, a gold medal had been awarded to the article for its excellence. *Taylor* v. *Gillies*, 59 N. Y. (14 Sick.) 331; 17 Am. Rep. 333; affirming S. C., 5 Daly, 285. "Cherry Pectoral," descriptive term. *Ayers* v. *Rushton*, unreported and now in court of appeals for review. "Lackawana Coal," designating locality. *Delaware & Hudson Canal Co.* v. *Clark*, 13 Wall. 311. "Glendon," descriptive of locality. *Glendon Iron Co.* v. *Uhler*, 75 Penn. St. 467; 15 Am. Rep. 599. "Durham," designating locality. *Blackwell* v. *Wright*, 73 N. C. 310. "Tucker Spring Bed," made under particular patent. *Tucker Manuf. Co.* v. *Boyington*, 9 Off. Gaz. (U. S. Patent Office) 455. "Prize Medal," common property. *Batty* v. *Hill*, 1 H. & M. 264; S. C., 2 New R. 265; 11 W. R. 745; 8 L. T. R. (N. S.) 791. "Victoria," common use in trade. *Wotherspoon* v. *Gray*, 36 Scottish Jurist, 24. "Colonial," general term. *Colonial Life Assurance Co.* v. *Home and Colonial Assurance Co.* (*Limited*), 33 L. J. (N. S.) Ch. 741; S. C., 33 Beav. 549. "Ne Plus Ultra," common in the trade. *Beard* v. *Turner*, 13 L. T. (N. S.) 747. "Washing Powder." *Falkinburg* v. *Lucy*, 35 Cal. 52. "Antiquarian Book Store," designating trade or occupation. *Choynski* v. *Cohen*, 39 Cal. 501; 2 Am. Rep. 476. "Julienne," designating article or its quality. *Godillot* v. *Hazard*, 49 How. (N. Y.) Pr. 5.

The symbols of a crown, a horseshoe and words "Best," "Scrap," "Plating," etc., are symbols and words common to the iron trade. *In re Barrows' application*, L. R., 5 Ch. Div. 353; 46 L. J. (N. S.) Ch. 725; 25 Weekly R. 564.

Words, which, in their ordinary and universal use, denote the virtues, such as "charity," "faith," etc., cannot ordinarily be appropriated by any one as a title or designation for a book, play, etc., written, etc., by him, treating or enforcing, symbolizing, etc., a virtue to the exclusion of any other person who may write, etc., a book, play, etc., treating upon, enforcing, symbolizing, etc., the same virtue. *Isaacs* v. *Daly*, 39 N. Y. Sup. Ct. (7 J. & Sp.) 511. The purchaser of a patent and of the right to use the name of the patentee for the goods manufactured by him thereunder, has no exclusive right to use of such name after the expiration of the patent, and another manufacturer will not

be precluded from using such name in representing that his goods are manufactured according to the patent, provided he does not do so in a manner liable to mislead. *Edelsten* v. *Vick*, 11 Hare, 78; S. C., 23 Eng. L. & Eq. 51; 18 Jurist, 7.

The word "aromatic," when employed to express one of the qualities of liquor, is not a trade-mark. *Burke* v. *Cassin*, 45 Cal. 467; 13 Am. Rep. 204. And a label at common law is not a trade-mark, although a manufacturer is entitled to the exclusive use of one adopted by him to distinguish his goods. Id.

An official inspector of fish cannot claim property in his official brand as his private trade-mark. *Chase* v. *Mayo*, 121 Mass. 343.

§ 4. **Infringement.** The imitation of a trade-mark, to render a party liable for an infringement, need not be a precise copy of the original; if there is a similarity so that the community would be likely to be deceived, it is a sufficient infringement of the right of property in the mark. *Bradley* v. *Norton*, 33 Conn. 157; *Hostetter* v. *Vowinkle*, 1 Dill. 329; *Walton* v. *Crowley*, 3 Blatchf. C. C. 440; *Filley* v. *Fassett*, 44 Mo. 168; *Tallcot* v. *Moore*, 6 Hun, 106. An imitation is colorable and will be enjoined, where it requires a careful inspection to distinguish its mark and appearance from that of the manufacturer imitated. *Blackwell* v. *Wright*, 73 N. C. 310; *Lockwood* v. *Bostwick*, 2 Daly, 521; *Edelsten* v. *Edelsten*, 1 DeG. J. & S. 185; S. C., 9 Jur. (N. S.) 479; 11 W. R. 328. It is an infringement, even though the imitation and original, when placed side by side, would not mislead, if the similarity is such that a difference would not be noticed when seen at different times or places. *Sohl* v. *Geisendorf*, 1 Wilson (Ind.), 60; *Seixo* v. *Provezende*, L. R., 1 Ch. App. 192; S. C., 14 W. R. 357; 14 L. T. (N. S.) 314; 12 Jurist (N. S.), 215; *Fettridge* v. *Wells*, 4 Abb. Pr. 144; S. C., 13 How. Pr. 385. The court in every case must ascertain whether the differences are made *bona fide* in order to distinguish the one article from the other, whether the resemblances and the differences are such as naturally arose from the necessity of the case, or whether, on the other hand, the differences are simply colorable, and the resemblances such as are obviously intended to deceive the purchaser of the one article into the belief of its being the manufacture of another person. Resemblance is a circumstance of primary importance for the court to consider, because, if the court find that there is no reason for the resemblance, except for the purpose of misleading, it will infer that the resemblance was adopted for the purpose of misleading. *Taylor* v. *Taylor* 23 Eng. L. & Eq. 281; S. C., 23 L. J. (N. S.) Ch. 255; *Amoskeag Manuf. Co.* v. *Spear*, 2 Sandf. Sup. Ct. 599, *Blackwell* v. *Armistead*, 5 Am. Law

Times, 85. And it must appear that the ordinary mass of purchasers, paying the usual attention in buying the article in question, would be deceived. *Rowley* v. *Houghton*, 2 Brewst. 303; S. C., 7 Phil. 39; *Cope* v. *Evans*, L. R., 18 Eq. 138; S. C., 30 L. T. (N. S.) 292; 22 W. R. 453; *Blackwell* v. *Wright*, 73 N. C. 310. In determining the question of infringement, the criterion is not the certainty of success in misleading the public, but its probability, or even its possibility. *Amoskeag Manuf. Co.* v. *Spear*, 2 Sandf. Sup. Ct. 599; approved in *The Amoskeag Manuf. Co.* v. *Garner*, 4 Am. Law Times (N S.), 176. To the same effect, *Filley* v. *Fassett*, 44 Mo. 168.

A sign containing a firm name used over the doorway of a store may be infringed upon as a trade-mark. *Peterson* v. *Humphrey*, 4 Abb. Pr. 394; *Burgess* v. *Burgess*, 3 De G. M. & G. 896; S. C., 17 Eng. L. & Eq. 257; *Colton* v. *Thomas*, 2 Brewst. 308. The name established for a hotel is a trade-mark, in which the proprietor has a valuable interest, which a court of equity will protect from infringement. *Woodward* v. *Lazar*, 21 Cal. 449; *Howard* v. *Henriques*, 3 Sandf. Sup. Ct. 725. A trader may establish a trade-mark by the use of a crest, and any thing which amounted to an imitation of the crest as a trade-mark would be restrained by the court. But the use of a different crest by another maker, if not accompanied by other indiciæ to make it a colorable imitation of the trade-mark of the plaintiff, will not be restrained. *Beard* v. *Turner*, 13 L. T. (N. S.) 747.

§ 5. **What not an infringement.** A variation must be regarded as immaterial, which requires a close inspection to detect, and which can scarcely be said to diminish the effect of the *fac simile* which the simulated label in all other respects is found to exhibit. *Fetridge* v. *Wells*, 4 Abb. (N. Y.) Pr. 144; S. C., 13 How. Pr. 385; *Blackwell* v. *Wright*, 73 N. C. 310; *Bass* v. *Dawber*, 19 L. T. (N. S.) 626; *McCartney* v. *Garnhart*, 45 Mo. (4 Post) 593. So, where, in a stamp used by the defendants, the form of the printed words, the words themselves, and the pictured symbol introduced among them, so much differed from that of the plaintiffs, that any person with reasonable care and observation must see the difference, and could not be misled into taking one for the other, there is no infringement. *Vigilantibus non dormientibus leges subserviunt. The Leather Cloth Co.* (limited) v. *The American Leather Cloth Co.* (limited), 11 H. of Lords Cas. 523; S. C., 11 Jurist (N. S.), 513; 35 L. J. (N. S.) Ch. 53; affirming S. C., 33 L. J. (N. S.) Ch. 199; 10 Jurist (N. S.), 81; reversing S. C., 1 H. & M. 271; 32 L. J. (N. S.) Ch. 721. In brief, to entitle a party to relief for an alleged infringement of a trade-mark, the resemblance of the simulated to the genuine trade-mark must be such as to amount to a false representation,

which is liable to deceive the public and enable the imitator to pass off his goods as those of the person whose trade-mark is imitated. When ordinary attention on the part of customers will enable them to discriminate between the trade-marks of different parties the court will not interfere. *Popham* v. *Cole*, 66 N. Y. (21 Sick.) 69; 23 Am. Rep. 22; *Blackwell* v. *Crabb*, 36 L. J. (N. S.) Ch. 504; *Cope* v. *Evans*, L. R., 18 Eq. 138; S. C., 30 L. T. (N. S.) 292; *Tallcot* v. *Moore*, 6 Hun, 106.

In matters of trade-marks or labels for medical compounds, mere similarity of size, or square packages, or of classification of diseases or symptoms, is insufficient to invoke equitable interference. Compounding medicines is an open trade, and protection by law is only authorized when the peculiar symbols and devices are put upon the public in fraud of individual rights acquired by priority of use and title therein. *Ellis* v. *Zeilen & Co.*, 42 Ga. 91; *Scoville* v. *Toland*, 6 West. Law Jour. 84.

§ 6. **Statutory provisions.** Any person or firm domiciled in the United States, and any corporation created by the authority of the United States, or of any State or Territory thereof, and any person, firm, or corporation resident of, or located in any foreign country, which by treaty or convention affords similar privileges to citizens of the United States, and who are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt and use any trade-mark, for exclusive use within the United States, may obtain protection for such lawful trade-mark by complying with the following requirements:

*First.* By causing to be recorded in the patent office a statement specifying the names of the parties and their residences and place of business, who desire the protection of the trade-mark; the class of merchandise and the particular description of goods comprised in such class, by which the trade-mark has been or is intended to be appropriated; a description of the trade-mark itself, with *fac similes* thereof, showing the mode in which it has been or is intended to be applied and used; and the length of time, if any, during which the trade-mark has been in use.

*Second.* By making payment of a fee of twenty-five dollars, in the same manner and for the same purpose as the fee required for patents.

*Third.* By complying with such regulations as may be prescribed by the commissioner of patents. U. S. Rev. Stat., title LX, chap. 2, p. 963, § 4937.

The certificate prescribed by the preceding section must, in order to create any right whatever in favor of the party filing it, be accompanied by a written declaration, verified by the person, or by some member of the firm, or officer of the corporation by whom it is filed, to the

effect that the party claiming protection for the trade-mark has a right to the use of the same, and that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; and that the description and *fac similes* presented for record are true copies of the trade-mark sought to be protected. Id., p. 964, § 4938.

The commissioner of patents shall not receive and record any proposed trade-mark which is not and cannot become a lawful trade-mark, or which is merely the name of a person, firm, or corporation, unaccompanied by a mark sufficient to distinguish it from the same name when used by other persons, or which is identical with a trade-mark appropriate to the same class of merchandise and belonging to a different owner, and already registered or received for registration, or which so nearly resembles such last-mentioned trade-mark, as to be likely to deceive the public. But this section shall not prevent the registry of any lawful trade-mark, rightfully in use on the 8th day of July, 1870. Id., p. 964, § 4939.

The time of the receipt of any trade-mark at the patent office for registration shall be noted and recorded. Copies of the trade-mark and of the date of the receipt thereof, and of the statement filed therewith, under the seal of the patent office, certified by the commissioner, shall be evidence in any suit in which such trade-mark shall be brought in controversy. Id., p. 964, § 4940.

A trade-mark registered as above prescribed shall remain in force for thirty years from the date of such registration, except in cases where such trade-mark is claimed for and applied to articles not manufactured in this country, and in which it receives protection under the laws of any foreign country for a shorter period, in which case it shall cease to have any force in this country by virtue of this act at the same time that it becomes of no effect elsewhere. Such trade-mark during the period that it remains in force shall entitle the person, firm or corporation registering the same to the exclusive use thereof, so far as regards the description of goods to which it is appropriated in the statement filed under oath as aforesaid, and no other person shall lawfully use the same trade-mark or substantially the same or so nearly resembling it, as to be calculated to deceive, upon substantially the same description of goods. And at any time during the six months prior to the expiration of the term of thirty years, application may be made for a renewal of such registration under regulations to be prescribed by the commissioner of patents. The fee for such renewal shall be the same as for the original registration, and a certificate of such renewal shall be issued in the same manner as for the original registration, and

such trade-mark shall remain in force for a further term of thirty years. Id., p. 964, § 4941.

Any person who shall reproduce, counterfeit, copy or imitate any recorded trade-mark, and affix the same to goods of substantially the same descriptive properties and qualities as those referred to in the registration, shall be liable to an action on the case for damages for such wrongful use of such trade-mark at the suit of the owner thereof, and the party aggrieved shall also have his remedy according to the course of equity to enjoin the wrongful use of his trade-mark and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful use. Id., p. 964, § 4942.

No action shall be maintained under the provisions of this chapter by any person claiming the exclusive right to any trade-mark which is used or claimed in any unlawful business, or upon any article which is injurious in itself, or upon any trade-mark which has been fraudulently obtained, or which has been formed and used with the design of deceiving the public in the purchase or use of any article of merchandise. Id., p. 964, § 4943.

Any person who shall procure the registry of any trade-mark, or of himself as the owner of a trade-mark, or an entry respecting a trade-mark in the patent office by making any false or fraudulent representations or declarations, verbally or in writing, or by any fraudulent means, shall be liable to pay any damages sustained in consequence of any such registry or entry to the person injured thereby to be recovered in an action on the case. Id., p. 965, § 4944.

Nothing in this chapter shall prevent, lessen, impeach or avoid any remedy at law or in equity, which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of this chapter had not been enacted. Id., p. 965, § 4945.

Nothing in this chapter shall be construed by any court as abridging or in any manner affecting unfavorably the claim of any person to any trade-mark after the expiration of the term for which such trade-mark was registered. Id., § 4946.

The commissioner of patents is authorized to make rules, regulations, and prescribe forms for the transfer of the right to the use of trade-marks, conforming as nearly as practicable to the requirements of law respecting the transfer and transmission of copyrights. Id., p. 965, § 4947.

By an act of congress, passed August 14, 1876, it is enacted:

*First.* That any and every person dealing in or selling, or keeping, or offering for sale knowingly, any trade-mark goods, etc., shall on convic-

tion thereof be punished by fine not exceeding $1,000 or imprisonment not more than two years, or both such fine and imprisonment.

*Second.* That every person fraudulently affixing a registered trade-mark or a colorable imitation thereof to goods of substantially the same descriptive properties, etc., on conviction thereof shall be punished as above.

*Third.* That every person fraudulently filling a package bearing registered trade-marks with substantially the same goods, etc., shall be punished as above, on conviction thereof.

*Fourth.* That every person, with intent to defraud, making trade-mark dies, etc., shall on conviction thereof be punished as above.

*Fifth.* That every person, with intent to defraud, counterfeiting, etc., registered trade-marks, shall, on conviction thereof, be punished as above prescribed.

*Sixth.* That any person dealing in, etc., with intent to injure or defraud, empty packages bearing trade-marks, etc., shall, on conviction thereof, be punished as above prescribed.

*Seventh.* That if the owner of any trade-marks registered, etc., or his agent, make oath in writing, that he has reason to believe and does believe that counterfeit dies, etc., are in the possession of any person, with intent to use the same for the purpose of deception and fraud, or make such oaths that any counterfeits or colorable imitations of his said trade-mark, etc., are in the possession of any person with intent to use the same for the purpose of deception and fraud, then the several judges of the circuit and district courts of the United States, and the commissioners of the circuit courts, may, within their respective jurisdictions, proceed under the law relating to search warrants, and may issue a search warrant authorizing and directing the marshal of the United States, for the proper district, to search for and seize all said counterfeit dies, etc., and upon satisfactory proof being made that said counterfeit dies, etc., are to be used by the holder or owner for the purposes of deception and fraud, that any of said judges shall have full power to order all said counterfeit dies, etc., to be publicly destroyed.

*Eighth.* That any person knowingly and willfully aiding and abetting violations of the provisions of this said act of congress, shall, upon conviction thereof, be punished by a fine not exceeding $500, or imprisonment not more than one year, or both such fine and imprisonment.

By the rules in trade-mark cases, all applications for registration are considered in the first instance by the trade-mark examiner. From adverse decision by such examiner upon the applicant's right to registration, an appeal directly to the commissioner will lie, no fee being charged therefor. In case of conflicting applications for registration,

the office reserves the right to declare an interference, in order that the parties may have opportunity to prove priority of adoption or right; and the proceedings on such interference will follow, as nearly as practicable, the practice in interferences upon applications for patents.

Where the trade-mark can be represented by a *fac simile*, which conforms to the rules for drawings of mechanical patents, such a drawing may be furnished by the applicant, and the additional copies will be produced by the photo-lithographic process, at the expense of the office. Or the applicant may furnish one *fac simile* of the trade-mark, mounted on a card ten by fifteen inches in size, and ten additional copies, upon flexible paper, not mounted, as in designs, but in all cases the mounted *fac simile* or the drawing must be signed by the applicant or his authorized attorney, and the signature must be attested by two witnesses.

The right to the use of any trade-mark is assignable by any instrument of writing, and such assignment must be recorded in the patent office within sixty days after its execution, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice. The fees will be the same as are prescribed for recording assignments of patents.

The remainder of the rules in trade-mark cases are substantially the statutory enactments.

A registration under the act of congress must stand or fall, as a whole, for that to which the registration declares it is intended to appropriate it, there being no provision to maintain a suit on it, where the grant is valid as to a part but not as to the whole. *Smith* v. *Reynolds*, 10 Blatchf. 85. And the protection given to the use of a trade-mark is to the exclusive use of such trade-mark only so far as regards the particular description of goods set forth in the statement filed under said act as the particular description of goods to or by which the trade-mark has been, or is intended to be appropriated; and the prohibition is only against the use, by another, of substantially the same trade-mark on goods of substantially the same descriptive qualities as such particular description of goods set forth in such filed statement. *Osgood* v. *Rockwood*, 11 Blatchf. 310. So the registration of a trade-mark for "paints" by A, who had previously acquired the exclusive use of such trade-mark for particular kinds of paints only, does not enable A to restrain B from using such trade-mark upon another kind of paint, to which B had been in the habit of affixing such trade-mark prior to such registration. *Smith* v. *Reynolds*, 13 Blatchf. 458. The certificate of the registry of a trade-mark issued to the claimant by the commissioner of patents under the act of congress of July 8, 1870, is not conclusive evidence that the device claimed as a trade-mark, is, or can become, a lawful

trade-mark, or that the claimant is the first appropriator, and entitled to its exclusive use. *Moorman* v. *Hoge*, 2 Sawyer, 78.

## ARTICLE II.

### REMEDIES.

**Section 1. Action for damages.** The owner of a trade-mark is entitled to nominal damages for the violation of his trade-mark, although it is not shown that he has sustained actual damage, and although the defendant's articles are not inferior in quality to his own. *Blofield* v. *Payne*, 1 Nev. & Man. 353; S. C., 4 Barn. & Ad. 410; 3 L. J. (N. S.) 68; *Thomson* v. *Winchester*, 19 Pick. 214; *Rodgers* v. *Nowill*, 5 C. B. 109; S. C., 6 Hare, 325. But vindictive damages are not to be allowed. *Taylor* v. *Carpenter*, 2 Woodb. & M. 1. A proper measure of damages is the profits actually realized by the defendants from the sales of the spurious article under the simulated trade-mark. But the recovery of the plaintiff is not limited to the amount of such profits. *Graham* v. *Plate*, 40 Cal. 593; 6 Am. Rep. 639; *Marsh* v. *Billings*, 7 Cush. 322; *Hostetter* v. *Vowinkle*, 1 Dillon, 329. The plaintiff is entitled to such profits regardless of the question, whether his business has been interfered with, or his profits affected thereby. *Peltz* v. *Eichele*, 62 Mo. 171. In an action for damages, where the use of another's trade-mark originated in mistake and not in design, the party may be exempted from damages and costs. *Amoskeag Manuf. Co.* v. *Spear*, 2 Sandf. Sup. Ct. 599. Proof of fraudulent user is of the essence of the action. *Edelsten* v. *Edelsten*, 9 Jurist (N. S.), 479; S. C., 1 De G. J. & S. 185; 1 New R. 300; *Wotherspoon* v. *Currie*, L. R., 5 Eng. & Ir. App. 508; S. C., 27 L. T. (N. S.) 393; reversing S. C., 23 L. T. (N. S) 443; and affirming S. C., 22 L. T. (N. S.) 260. But in equity a person, using the trade-mark of another without the sanction and authority of the owner, will be restrained by injunction, even where it does not appear there was any fraudulent intent in its use, and will be required to account for the profits derived from the sale of goods so marked. *Stonebreaker* v. *Stonebreaker*, 33 Md. 252; *Blackwell* v. *Wright*, 73 N. C. 310; *Ainsworth* v. *Walmsley*, L. R., 1 Eq. 518; S C., 35 L. J. (N. S.) Ch. 532.

The expense of obtaining an injunction cannot be embraced within the range of damages for the infringement of a trade-mark. *Burnett* v. *Phalon*, 21 How. (N. Y.) Pr. 100; S. C., 12 Abb. Pr. 186. And where a defendant is ordered to account for the profits made by him through a wrongful use of the plaintiff's trade-mark, he cannot be

charged with bad debts as profits; but on the other hand, he cannot charge the plaintiff with costs of manufacturing the goods in respect of which the bad debts were incurred. *Edelsten* v. *Edelsten*, 10 L. T. R. (N. S.) 780; S. C., 1 DeG. J. & S. 135.

Damages, accounts of profits, and costs will be refused where the plaintiff has unnecessarily delayed in bringing suit. *The Amoskeag Manuf. Co.* v. *Garner*, 4 Am. L. T. (N. S.) 176; *Harrison* v. *Taylor*, 12 L. T. (N. S.) 339; S. C., 11 Jurist (N. S.), 408.

The inventor of an unpatented medicine has no exclusive right to make and vend the same, but if others make and vend it, they have no right to vend it as the manufacture of the inventor, nor to adopt his label or trade-mark, nor one so like his as to lead the public to suppose the article to which it is affixed is the manufacture of the inventor; and they are equally liable for the damages, whether such trade-mark be adopted by fraud or mistake. *Davis* v. *Kendall*, 2 R. I. 566. If one manufactures goods himself and puts upon them the trade-mark of another, though he may not know to whom that mark belongs, he must at least know that he has no right himself to the mark. That knowledge makes him liable to account for the profits he may have realized by his conduct. But if one buys goods from a third party, believing them to be genuine, while in fact they are spurious, it is not until he has been told that they are so that he can be considered to be guilty of any fraud, or to be liable to render any account. *Molt* v. *Custon*, 33 Beav. 578; S. C., 10 L. T. (N. S.) 395.

§ 2. **Injunction, when granted.** A court of equity will restrain by injunction the unauthorized use of a manufacturer's or vendor's trade-mark. *Taylor* v. *Carpenter*, 11 Paige's (N. Y.) Ch. 292; S. C., 2 Sandf. Ch. 603; *Hennessey* v. *Wheeler*, 69 N. Y. (24 Sick.) 271; *Singer Manuf. Co.* v. *Kimball*, 10 Scottish L. R. 173; S. C., 45 Scottish Jurist, 201; *Blackwell* v. *Armistead*, 5 Am. L. T. 85. But to entitle a party to relief for an alleged infringement of a trade-mark, the resemblance of the simulated to the genuine trade-mark must be such as to amount to a false representation, which is liable to deceive the public, and enable the imitator to pass off his goods as those of the person whose trade-mark is imitated. When ordinary attention on the part of customers will enable them to discriminate between the trade-marks of different parties, the court will not interfere. *Popham* v. *Cole*, 66 N. Y. (21 Sick.) 69; 23 Am. Rep. 22; *Delaware & Hudson Canal Co.* v. *Clark*, 13 Wall. 311; *Osgood* v. *Allen*, 1 Holmes, 185; S. C., 6 Am. L. T. 20; *Blackwell* v. *Wright*, 73 N. C. 310; *Wotherspoon* v. *Currie*, L. R., 5 Eng. & Ir. App. 508; S. C., 42 L. J. (N. S.) Ch. 130; 27 L. T. (N. S.) 393; *Tallcot* v. *Moore*,

6 Hun, 106. One who asks on general principles of equity, and independent of statute, to have an infringement of his trade-mark enjoined, must show a clear legal right and a plain violation. On the question of violation, the true inquiry is, not whether the defendant intends to deceive, but whether his marks and symbols actually do deceive the public. *Blackwell* v. *Wright*, 73 N. C. 310; *Green* v. *Shepherd*, 38 Scottish Jurist, 523; *Ellis* v. *Zeillin*, 42 Ga. 91; *Foot* v. *Lea*, 13 Irish Eq. 484; *Coffeen* v. *Brunton*, 5 McLean, 256; *Tallcot* v. *Moore*, 6 Hun (N. Y.), 106. The court, in considering the propriety of enjoining a defendant, pending a litigation, who employs devices calculated and intended by him to secure the benefit of the reputation acquired by the plaintiff, will not feel called upon to be zealous to aid him by refined distinctions, so that he may evade the letter and violate the scope and spirit of the adjudged cases. *Williams* v. *Johnson*, 2 Bosw. 1. But the interference of courts of equity, instead of being founded on the theory of protection to the *owner* of trade-marks, is now supported mainly to prevent frauds upon the public. If the use of any words, numerals or symbols is adopted for the purpose of defrauding the public, the courts will interfere to protect the public from such fraudulent intent, even though the person asking the intervention of the court may not have the exclusive right to the use of these words, numerals or symbols. See *Newman* v. *Alvord*, 51 N. Y. (6 Sick.) 189; 10 Am. Rep. 588; *Lee* v. *Haley*, L. R., 5 Ch. App. Cas. 155; *Wotherspoon* v. *Currie*, L. R., 5 Eng. & Ir. App. 508.

A fancy name which designates a particular kind of article may be in general use in price lists which circulate between manufacturers and retail dealers, without prejudicing the right of the inventor to the exclusive use of a fancy name as a trade-mark in the sale of the article to the public. *Ford* v. *Foster*, L. R., 7 Ch. App. Cas. 611; 3 Eng. Rep. 538; S. C., 27 L. T. (N. S.) 219; 41 L. J. (N. S.) Ch. 682; 20 W. R. 318; reversing S. C., 20 W. R. 311. See, too, *Morrison* v. *Case*, 9 Blatchf. (C. C.) 548; *Hirst* v. *Denham*, L. R., 14 Eq. 542; 3 Eng. Rep. 833; S. C., 41 L. J. (N. S.) Ch. 752; 27 L. T. (N. S.) 56.

Where the name of a place has by user, by a particular maker of a particular article of manufacture, acquired a secondary signification in connection with that manufacture, and has obtained currency and value in the market as the trade denomination of that particular maker's goods, it becomes, in connection with that manufacture, the property of that maker as his trade-mark, or as part of his trade-mark. *Wotherspoon* v. *Currie*, L. R., 5 Eng. & Ir. App. 508; S. C., 42 L. J. (N. S.) Ch. 130; *M'Andrew* v. *Bassett*, 10 Jurist (N. S.), 550; S. C., 33 L. J. (N. S.) Ch. 561; 12 W. R. 777; 10 L. T. (N. S.) 442; affirming S. C.,

10 Jurist (N. S.), 492; 10 L. T. (N. S.) 65; *Newman* v. *Alvord*, 51 N. Y. (6 Sick.) 189; affirming S. C., 35 How. Pr. 108; 49 Barb. 588.

Where numbers are associated with the name of the manufacturer upon labels of a certain form, color and general arrangement, and in connection with such labels are used by him to indicate his own goods, they may, by virtue of that connection, form an important part of a trade-mark, and, as such, are entitled to protection by injunction. *Boardman* v. *Meriden Britania Co.*, 35 Conn. 402; *Gillott* v. *Esterbrook*, 48 N. Y. (3 Sick.) 374; 8 Am. Rep. 553; affirming S. C., 47 Barb. 455; *Kinney* v. *Allen*, 4 Am. L. T. (N. S.) 258.

Where a man has given his own name to a particular manufacture, and sells the use of his name in the manufacture of those particular goods, a court of equity will restrain him from advertising goods of the same quality under his own name, though actually made by him. *Probasco* v. *Bouyon*, 1 Mo. App. 241; *Gillis* v. *Hall*, Cox's Am. Trade-mark Cas. 596; *Ayers* v. *Hall*, 3 Brewst. 509; S. C., 8 Phil. 231.

A court of equity will protect a person in the use of a trade-mark, such as the name of a newspaper, although the name adopted is one that belongs to the language of the country, and may be employed in any way, or for any purpose, which will not defraud individuals or deceive the public. *American Grocer Publishing Association* v. *Grocer Publishing Co.*, 51 How. Pr. 402.

§ 3. **Injunction, when refused.** Every man has the absolute right to use his own name in his own business, even though he may thereby interfere with or injure the business of another person bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do any thing calculated to mislead. Where the only confusion created is that which results from the similarity of the names, the courts will not interfere. A person cannot make a trade-mark of his own name, and thus obtain a monopoly of it which will debar all other persons of the same name from using their own names in their own business. *Meneely* v. *Meneely*, 62 N. Y. (17 Sick.) 427; S. C., 20 Am. Rep. 489; *Meriden Britania Co.* v. *Parker*, 39 Conn. 450; 12 Am. Rep. 401; *Burgess* v. *Burgess*, 17 Eng. L. & Eq. 257; S. C., 3 DeG. M. & G. 896; 17 Jurist, 292; 22 L. J. (N. S.) Ch. 675. And there is no exclusive right in marks, symbols or letters, which indicate the appropriate name, mode or process of manufacture, or the peculiar or relative quality of the fabric manufactured, as distinguished from those marks which indicate the true origin or ownership. *The Amoskeag Manuf. Co.* v. *Spear*, 2 Sandf. Sup. Ct. 599; *Same* v. *Garner*, 55 Barb. 151; S. C., 6 Abb. (N. S.) 265; 4 Am. L. T. (N. S.) 176; *Ragett*

v. *Findlater*, L. R., 17 Eq. 29; 7 Eng. Rep. 653; S. C., 43 L. J. (N. S.) Ch. 64; 29 L. T. (N. S.) 448; 22 W. R. 53. So, the words "Ferro-Phosphorated Elixir of Calisaya Bark" cannot be protected as a trade-mark. *Caswell* v. *Davis*, 58 N. Y. (13 Sick.) 223; 17 Am. Rep. 233. Nor can the words "gold medal" be protected. *Taylor* v. *Gillies*, 59 N. Y. (14 Sick.) 331; 17 Am. Rep. 333; affirming S. C., 5 Daly, 285. An injunction will not be granted in favor of a plaintiff who has no more right to use a trade-mark than has the defendant to restrain the latter from manufacturing and selling under such trade-mark an article different from that represented by it, although such defendant does not know the secret of the manufacture of the genuine article. *Weston* v. *Ketcham*, 7 Jones & Sp. (N. Y.) 54; *Carmichael* v. *Latimer*, 11 R. I. 395; 23 Am. Rep. 481. And a court of equity will not interfere to protect a party in the use of trade-marks calculated to deceive the public. *Hobbs* v. *Francias*, 19 How. (N. Y.) Pr. 567; *Leather Cloth Company* v. *American Leather Cloth Company*, 11 H. L. Cas. 523. But this rule does not extend to cases where the deception alleged is not in the trade-mark itself, but in advertisements used to advance the sales of the article. *Curtis* v. *Bryan*, 2 Daly (N. Y.), 312; S. C., 36 How. Pr. 33; *Ford* v. *Foster*, L. R., 7 Ch. App. 611; 3 Eng. Rep. 538.

It must be considered as sound doctrine that no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the appellation as to prevent others inhabiting the district or dealing in similar articles coming from the district from truthfully using the same designation. *Delaware & Hudson Canal Co.* v. *Clark*, 13 Wall. 311; *Glendon Iron Co.* v. *Uhler*, 75 Penn. St. 467; 15 Am. Rep. 499; *Blackwell* v. *Wright*, 73 N. C. 310. If two parties are concerned in getting up a medicine, both contributing to the compound as a partnership action, neither can claim the exclusive use of the name or trade-mark used in connection therewith. *Coffeen* v. *Brunton*, 5 McLean, 256. See *Brown* v. *Mercer*, 5 Jones & Sp. (N. Y.) 265; *Bowman* v. *Floyd*, 3 Allen, 76.

The principle upon which equity enjoins a defendant from imitating the plaintiff's trade-marks are not applied to the publication of newspapers, except so far as to protect the proprietor of a paper in the use of the name adopted by him for such paper. *Stephens* v. *De Couto*, 7 Robt. (N. Y.) 343; S. C., 4 Abb. (N. S.) 47. See *Bradbury* v. *Beeton*, 39 L. J. (N. S.) Ch. 57; S. C., 21 L. T. (N. S.) 323; 18 W. R. 33. And a court of equity ought not to interfere by injunction to restrain the use of a trade-mark where the testimony in regard to the right to the ownership of such trade-mark is conflicting and contradictory, so that

it is difficult to determine on which side the weight of evidence preponderates. *Witthans* v. *Mattfeldt*, 44 Md. 303; 22 Am. Rep. 44.

If it appears that the trade-mark, alleged to be an imitation, though in some respects resembling that of the plaintiff, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted. *Blackwell* v. *Wright*, 73 N. C. 310; *Frese* v. *Bachof*, 13 Blatchf. 234; *Tallcot* v. *Moore*, 6 Hun, 106; *Bass* v. *Dawber*, 19 L. T. (N. S.) 626.

Courts of equity sometimes refuse to interfere in behalf of persons who claim property in a trade-mark acquired by advertising their wares under representations that are false. *Seabury* v. *Grosvenor*, 53 How. (N. Y.) Pr. 192; *Helmbold* v. *Helmbold Mf'g Co.*, id. 453.

Where a grantor had affixed his name to a theatre by his acts, his grantees and their successors will not be restrained from calling the theatre the name which he had given it, on the ground that the public would be misled into believing he was still the manager. *Booth* v. *Jarrett*, 52 How. (N. Y.) Pr. 169.

§ 4. **Defenses.** Misrepresentations in a trade-mark amounting to a fraud upon the public will disentitle the person making such misrepresentation to protection in a court of equity against a rival trader; and, as a general rule, a misstatement of any material fact, calculated to impose upon the public, will be sufficient for the purpose; *e. g.*, a trade-mark representing an article as protected by a patent, when in fact it is not so protected, or a trade-mark falsely representing an article as the production of an artist of special skill, or of a place of special adaptation. *Leather Cloth Co.* (*Limited*) v. *American Leather Cloth Co.* (*Limited*), 11 H. of L. Cas. 523; S. C., 12 L. T. (N. S.) 742; 35 L. J. (N. S.) Ch. 53; 6 New R. 209; 13 W. R. 873; 11 Jurist (N. S.), 513; affirming S. C., 33 L. J. (N. S.) Ch. 199; 9 L. T. (N. S.) 558; 12 W. R. 289; 10 Jurist (N. S.), 81; and reversing S. C., 1 H. & M. 271; 32 L. J. (N. S.) Ch. 721; 11 W. R. 931; 8 L. T. (N. S.) 829; *Laird* v. *Wilder*, 9 Bush (Ky.), 131; 15 Am. Rep. 707; *Wolfe* v. *Burke*, 56 N. Y. (11 Sick.) 115. Misrepresentation on the part of the owner of the trade-mark sought to be protected is a defense that ought to be suggested by the court in some cases, and probably would be in all cases where the imposition is flagrant. For instance, when a quack compounds noxious and dangerous drugs, hurtful to the human constitution, and advertises them as a safe and sure remedy for disease; or when some charlatan avails himself of the prejudice, superstition, or ignorance of some portion of the public, to palm off a worthless article, even when not injurious, the case falls beneath the dignity of a court of justice to lend its aid for the redress

of such a party who has been interfered with by the imitations of another quack or charlatan. But the suggestion comes with a poor grace from one who has, by the imitation, been guilty of the same fraud or imposition upon the public, if such it happens to be. *Smith* v. *Woodruff*, 48 Barb. 438. See *Palmer* v. *Harris*, 60 Penn. St 156; *Lee* v. *Haley*, L. R., 5 Ch. App. 155; S. C., 39 L. J. (N. S.) Ch. 284; 18 W. R. 242. But a collateral misrepresentation by the owner of the trade-mark will not disentitle him to relief, either at law or in equity. *Ford* v. *Foster*, L. R., 7 Ch. App. Cas. 611; 3 Eng. R. 538; S. C., 41 L. J. (N. S.) Ch. 682; 20 W. R. 318; 27 L. T. (N. S.) 219; reversing S. C., 20 W. R. 311. See *Ellis* v. *Zeilin*, 42 Ga. 91. Where fraud and falsehood on the part of the plaintiff are relied on as a forfeiture of his title to relief in equity for a violation of a trade-mark, it must result from direct proof and not from mere crimination or argument. *Blackwell* v. *Armistead*, 5 Am. L. T. 85; *Lee* v. *Haley*, L. R., 5 Ch. 155; S. C., 18 W. R. 242; 39 L. J. (N. S.) Ch. 284. See *Hennessy* v. *Wheeler*, 69 N. Y. (24 Sick.) 271; reversing S. C., 51 How. Pr. 457.

Though one discover or invent an article and give it a peculiar and distinctive name, if he permit another with his acquiescence to appropriate it with that name and to put it forth to the public as his own, that other will become the proprietor of the name, if he meets the other conditions prescribed by the law. *Caswell* v. *Davis*, 58 N. Y. (13 Sick.) 223; 17 Am. Rep. 233. See *Delaware & Hudson Canal Co.* v. *Clark*, 7 Blatchf. 112; S. C., on appeal, 13 Wall. 311; *Flavell* v. *Harrison*, 19 Eng. L. & Eq. 15; S. C., 10 Hare, 467; 17 Jurist, 368. But in order to prove acquiescence by a firm in the piratical use of their trade-mark, knowledge of such use must be proved. *Kinahan* v. *Bolton*, 15 Irish Ch. 75; *Amoskeag M'f'g Co.* v. *Garner*, 55 Barb. 151; S. C., 6 Abb. Pr. (N. S.) 265. The issuing of a "caution" to the public by the owner of a trade-mark will not be construed as an irrevocable acquiescence in its use by others. *Gillott* v. *Esterbrook*, 47 Barb. 455; 48 N. Y. (3 Sick.) 374. And the use of the trade-mark for 20 years by others, where the plaintiffs had no knowledge of the practice and did not authorize or acquiesce in the same, does not preclude the owner from enforcing his sole right. *Gillott* v. *Esterbrook*, 48 N. Y. (3 Sick.) 374; affirming S. C., 47 Barb. 445. See *Wolf* v. *Barnett*, 24 La. Ann. 97; 13 Am. Rep. 111; *Rodgers* v. *Rodgers*, 31 L. T. (N. S.) 285; S. C., 22 W. R. 887. And it is no defense that a fraud has been practiced by other parties. *Filley* v. *Fassett*, 44 Mo. 168; *Gillott* v. *Esterbrook*, 47 Barb. 445; 48 N. Y. (3 Sick.) 374.

Where a plaintiff laid by for two years before filing his bill for an in-

junction, having seen labels of the defendant exhibited publicly, which he now complained of as being colorable imitations of his labels, such laches was a good defense. *Beard* v. *Turner*, 13 L. T. (N. S.) 747. And in a later case the plaintiff was precluded from right to relief by delaying six months to commence suit. *Eastcourt* v. *Eastcourt Hop Essence Co.* (*Limited*), 44 L. J. (N. S.) Ch. 223; S. C., L. R., 10 Ch. 276; 32 L. T. (N. S.) 80; 23 W. R. 313; reversing S. C., 31 L. T. (N. S.) 567.

Neither alienage of the person whose trade-marks are simulated, nor the fact that he resides abroad, constitutes a defense. *Collins Co.* v. *Brown*, 3 Kay & J. 423; S. C., 3 Jurist (N. S.), 929; *Same* v. *Cowen*, 3 Kay & J. 428; *Same* v. *Reeves*, 28 L. J. Ch. 56; *Taylor* v. *Carpenter*, 11 Paige, 292; S. C., 2 Sandf. Ch. 603. And it is no answer to a suit for the violation of a trade-mark that the stimulated article is equal in quality to the genuine. *Cook* v. *Starkweather*, 13 Abb. Pr. (N. S.) 392; *Blofeld* v. *Payne*, 1 N. & M. 353; S. C., 4 B. & Ad. 410; 3 L. J. (N. S.) 68. It is no answer that the maker of the spurious goods, or the jobber who sells them to the retailers, informs those who purchase that the article is spurious or an imitation. *Coats* v. *Holbrook*, 2 Sandf. Ch. 586; *Edelsten* v. *Edelsten*, 1 DeG. J. & S. 185; S. C., 9 Jurist (N. S.), 479; 11 W. R. 328; 1 New R. 300. And it is no defense that the fraud was not intentional. The intent is immaterial. If the imitation is calculated to mislead, the intention to deceive is to be inferred therefrom. *Filley* v. *Fassett*, 44 Mo. 168; *Holmes* v. *Holmes, Booth & Atwood Manuf. Co.*, 37 Conn. 278; 9 Am. Rep. 324; *The Amoskeag M'f'g Co.* v. *Garner*, 55 Barb. 151; 6 Abb. (N. S.) 265; 4 Am. L. T. (N. S.) 176; *Wotherspoon* v. *Currie*, L. R., 5 Eng. & Ir. App. 508; S. C., 42 L. J. (N. S.) Ch. 130; 27 L. T. (N. S.) 393; reversing S. C., 23 L. T. (N. S.) 443; 18 W. R. 942; and affirming S. C., 22 L. T. (N. S.) 260; 18 W. R. 562.

It is no defense that the defendants have not used all of the plaintiff's labels; it is sufficient if there has been a violation of the plaintiff's rights by the defendant in imitating and using any of the labels with a view to deceive the public. *Taylor* v. *Carpenter*, 3 Story, 458.

It is no defense to a suit in equity that the plaintiff had falsely represented himself in his invoices and in a few advertisements as the "patentee" of the article he sought to sell if such false representation was not sufficient to prevent him from sustaining an action at law. *Ford* v. *Foster*, L. R., 7 Ch. App. Cas. 611; 3 Eng. R. 538; S. C., 41 L. J. (N. S.) Ch. 682; reversing S. C., 20 W. R. 311.

# CHAPTER CXXVII.

## TRESPASS.

### ARTICLE I.

#### OF TRESPASS IN GENERAL.

**Section 1. Definition and nature.** Trespass, in its legal signification, has a twofold meaning, a wrong committed, and the remedy by action for damages. The injury must have been caused by the exercise of unlawful force, and be the immediate consequence of such force. *Barber* v. *Barnes*, 2 Brev. 491; *Adams* v. *Hemmenway*, 1 Mass. 145. The wrong may be to the person, as by assault and battery or false imprisonment, or to the rights of property, and be either intentional or the result of negligence, or recklessness. *M'Laughlin* v. *Prior*, 1 Car. & M. 354; *Scott* v. *Bay*, 3 Md. 431; *Schuer* v. *Veeder*, 7 Blackf. 342; *Rappelyea* v. *Hulse*, 7 Halst. 257; *Churchill* v. *Rosebeck*, 15 Conn. 359; *Strohl* v. *Levan*, 39 Penn. St. 177. It may be in respect to property by means of which an incorporeal right is enjoyed. *Wilson* v. *Smith*, 10 Wend. 324. So, the act may be one which the party injured could not lawfully do himself. *Peck* v. *Smith*, 1 Conn. 103. See *Chatham* v. *Brainerd*, 11 Conn. 83, 84; *post*, p. 75. And the force may be only implied as by a wrongful though a peaceable entry on land.

§ 2. **What is not a trespass.** An injury committed by the involuntary act of a person who has no control over his will, as in the case of idiocy or lunacy, or by one impelled by necessity, his own life being in danger, is not a trespass. *Vincent* v. *Stinehour*, 7 Vt. 62. The same is the case when injury results from unavoidable accident in the prosecution of a lawful act without any blame on the part of the person who does the injury. *Davis* v. *Saunders*, 2 Chit. 639; *Goodman* v. *Taylor*, 5 Car. & P. 410; *Roche* v. *Milwaukee Gas Co.*, 5 Wis. 55. When a person goes on to premises the proprietor of which owes him no duty, and is there accidentally hurt, the latter is not liable. *Phila. & Reading R. R. Co.* v. *Hummell*, 44 Penn. St. 375; *Gillis* v. *Pa. R. R. Co.*, 59 id. 129. Acts done under authority of law are not punishable as trespasses (*Hammond* v. *Howell*, 1 Mod. 184; *Durand* v. *Hollins*, 4 Blatchf. 451); nor such as are committed in the er-

roneous exercise of a discretion confided to a person. *Ferguson* v. *Earl of Kinnoul*, 9 Cl. & Fin. 290. Redress will not be afforded for a wrong committed in a transaction in which the party claiming damages was himself guilty of a violation of law. *Spaulding* v. *Preston*, 21 Vt. 9; *Lord* v. *Chadbourne*, 42 Me. 429; *Gregg* v. *Wyman*, 4 Cush. 322. See *Illegality*, sub. *Sunday*.

§ 3. **Injury without actual damage.** When the legal right of another is infringed which it is important for the possessor to establish, and the invasion of which, if overlooked, will be evidence in future in favor of the wrong-doer, an action for damages may be maintained not only when no pecuniary loss can be shown, but even when the act is a temporary benefit. *Embrey* v. *Owen*, 6 Exch. 353; *Patrick* v. *Greenway*, 2 Wms. Saund. 346, note 2; *Ashby* v. *White*, 2 Ld. Raym. 948; *Tillotson* v. *Smith*, 32 N. H. 90; *Cadwell* v. *Farrell*, 28 Ill. 438. Vol. 1, p. 40. But if no injury has resulted or is likely to result from the wrongful act, it will not be a ground of recovery. *Williams* v. *Moyston*, 4 M. & W. 145; *Young* v. *Spencer*, 21 Eng. C. L. 145: *contra*: *Cole* v. *Green*, 1 Lev. 309.

§ 4. **Acts which may or may not be trespass.** Although language however abusive cannot in itself constitute a trespass, yet it may serve to give character to the act and to aggravate the offense. *Merest* v. *Harvey*, 5 Taunt. 442. If it be alleged that the injury was committed under circumstances of necessity affording a justification, the existence of such necessity must not only be proved, but also that the person sought to be charged took every possible care he was capable of to avoid doing the mischief. *Weaver* v. *Ward*, Hob. 134; *Dygert* v. *Bradley*, 8 Wend. 469. Where unavoidable accident is set up in excuse, unless the defendant shows that he exercised the prudence of the most prudent kind of men, he will be answerable in damages. *Wakeman* v. *Robinson*, 1 Bing. 213; *Sullivan* v. *Murphy*, 2 Miles, 298; *Jennings* v. *Fundeburg*, 4 McCord, 161; *Morgan* v. *Cox*, 22 Mo. 373. If a person voluntarily does a thing which he is not obliged to do, and another is injured thereby, he will be liable even in case of accident. *Gregory* v. *Piper*, 9 B. & C. 591; *Gates* v. *Miles*, 3 Conn. 64; *Jordan* v. *Wyatt*, 4 Gratt. 151. A person may be liable for injury caused by him while engaged in a lawful pursuit when, owing to the mode in which the business is conducted, it affects another's enjoyment of life or property. *Bonomi* v. *Backhouse*, El. Bl. & El. 622; 6 B. & S. 970; *Bushel* v. *Miller*, 1 Str. 129; *Clark* v. *Foote*, 8 Johns. 421; *McKeon* v. *See*, 4 Rob. 449; 51 N. Y. (6 Sick.) 300; 10 Am. Rep. 659.

§ 5. **Knowledge, intent or motive.** It is a rule, that when a per-

son does an unlawful or mischievous act which is likely to injure another, and when he does a lawful act so heedlessly or improperly that some one may probably be damnified thereby, he will be held responsible for any injury that may ensue to the persons or property of others irrespective of his real intention, or although his conduct was governed by no particular motive, and he will be held to have intended all the damages which legitimately result. *Guille* v. *Swan*, 19 Johns. 381; *Vandenburgh* v. *Truax*, 4 Denio, 464; *Allison* v. *Chandler*, 11 Mich. 542; *Dibble* v. *Morris*, 26 Conn. 416; *Brooks* v. *Olmstead*, 17 Penn. St. 24. It is sufficient to maintain trespass that the wrongful act was committed without any justifiable cause or purpose. *Sanderson* v. *Baker*, 2 W. Blk. 832; *Cate* v. *Cate*, 44 N. H. 211. It may be a ground of recovery even when done through an honest mistake. *Hobart* v. *Hagget*, 12 Me. 67. A person who assumes to interfere with the property of another is bound to ascertain whether his act is sanctioned by law, and he cannot excuse himself by asserting that he supposed his proceeding was lawful. *Hamilton* v. *Hunt*, 14 Ill. 472. But although proof of the good or bad intention of the defendant in committing a trespass cannot affect the plaintiff's right of action, yet such evidence is admissible as tending to characterize the offense, and it is often useful as bearing upon the question of damages. *Webb* v. *Beavan*, 6 Mann. & G. 1055; *Com.* v. *Snelling*, 15 Pick. 321; *Handy* v. *Johnson*, 5 Md. 450; *French* v. *Marstin*, 24 N. H. 440; *Materson* v. *Curtis*, 11 Wis. 424; *Roth* v. *Smith*, 41 Ill. 314; *Bruch* v. *Carter*, 3 Vroom, 554; *Sherman* v. *Kortright*, 52 Barb. 267. The mere intention of the plaintiff to do a subsequent unlawful act, being from its nature mutable, cannot be substituted for the act. *Gates* v. *Lounsbury*, 20 Johns. 427. So, if what is done is not illegal, bad motives in doing it cannot be made a ground of action. *Pickard* v. *Collins*, 23 Barb. 444; *Bartlett* v. *Kinsley*, 15 Conn. 327. Vol. 1, pp. 35, 36.

§ 6. **Assent to, or waiver of trespass.** Where an injury consists in the wrongful cutting down of trees the owner of the land may waive trespass *qu. cl. fr.* and sue for the value of the timber severed and carried away, in which case the action would be transitory. *Shank* v. *Cross*, 9 Wend. 160. When, however, trees are cut and carried away without the owner's permission, he cannot waive the tort and sue in assumpsit, unless the wrong-doer has sold the trees. *Jones* v. *Hoar*, 5 Pick. 285. Where a guardian gave a person leave to cut timber on the land of his wards, and received part of the pay therefor, which was afterward recovered by them from the guardian, it was held that as the wards had thus waived the tort, they could not maintain an action of trespass against the person who cut the timber for the balance of the pay. *Burnett* v. *Beasley*,

5 Jones (N.C.), 335. An action of trespass cannot be maintained against a military officer, who, with the implied assent of the owner of an unoccupied field to use the same for a drill ground, cuts down saplings which interfere with the use of the field in the way proposed. *Law* v. *Nettles*, 2 Bailey, 447. A person does not waive his legal remedy by yielding to a wrongful dispossession. *Hamilton* v. *Cutts*, 4 Mass. 349. Where, however, the owner of land devastated by the army of the late Confederate States, brought an action of trespass against certain citizens for assisting in the devastation, and it was proved that such aid was rendered under a military requisition, and the evidence tended to show that the plaintiff, being told by the officers in command that all damages should be paid, acquiesced, and the damages were assessed, but whether they were ever paid did not appear, it was held that the defendants were not liable. *Baker* v. *Wright*, 1 Bush, 500.

An injunction to stay a trespass will not be granted, if the party applying for it has laid by and permitted the expenditure of large sums of money in contravention of his rights without making complaint or objection during the progress of the work. *Parrott* v. *Palmer*, 3 Myl. & K. 632; *Wood* v. *Sutcliffe*, 2 Sim. (N. S.) 163; *Birmingham Canal Co.* v. *Lloyd*, 18 Ves. 515; *Balt. & Ohio R. R. Co.* v. *Strauss*, 37 Md. 237. Where, however, the legal right is established, and the aid of a court of equity necessary, delay will not be a ground for a denial of relief, unless the delay be coupled with such acquiescence as to deprive the party of all claim to the interposition of equity in his behalf. *Carlisle* v. *Cooper*, 21 N. J. Eq. 576.

Where the owner of an animal wrongfully killed, takes possession of it, he does not thereby waive the trespass, but it only goes in reduction of damages. *Champion* v. *Vincent*, 20 Texas, 811. If an attachment is wrongfully issued and served, the debtor does not waive the trespass by appearing and obtaining a change of venue. *Thomas* v. *Hinsdale*, 78 Ill. 259.

§ 7. **Liability for injury consequent upon wrongful act.** It is a well-settled rule, that every one who does an unlawful act is regarded as the doer of whatever follows, and liable for all the consequences which flow immediately therefrom, notwithstanding the final result might have been prevented by the care and skill of the person injured (*Gilbertson* v. *Richardson*, 5 C. B. 502; *Scott* v. *Shepherd*, 2 W. Bla. 892; *Leame* v. *Bray*, 3 East, 286; *Phares* v. *Stewart*, 9 Port. 336; *Burton* v. *McClellan*, 2 Scam. 434; *Vandenburgh* v. *Truax*, 4 Denio, 464; *Ricker* v. *Freeman*, 50 N. H. 420; 9 Am. Rep. 267); or that other causes for which the defendant was not in fault might have contributed to the result (*Hooksett* v. *Amoskeag Manuf. Co.*, 44 N. H. 105;

*Hooker* v. *Miller*, 37 Iowa, 613; 18 Am. Rep. 18; *Roll* v. *City of Indianapolis*, 52 Ind. 547); or, that the damage was not sustained until sometime after the doing of the wrongful act. *Dickenson* v. *Boyle*, 17 Pick. 78. But a remote cause of injury cannot be made a ground of recovery. *Taft* v. *Metcalf*, 11 id. 456.

§ 8. **Inciting or aiding in a trespass.** A person who commands, or stands by and approves of a trespass, is equally guilty with the one who does the act. *Judson* v. *Cook*, 11 Barb. 642; *McMurtrie* v. *Stewart*, 21 Penn. St. 322; *Mallory* v. *Merritt*, 17 Conn. 178; *Clark* v. *Bales*, 15 Ark. 452. In an action for a trespass alleged to have been committed in the service of the writ of restitution in proceedings of forcible entry and detainer, the court was asked to charge that if the trespass was committed by other persons than the defendant, the jury should find for her unless she aided and abetted in the commission of the trespass. The court gave the instruction with this addition: "or authorized the constable to take possession of the house, by removing the plaintiff and her goods, or with the knowledge thereof, approved the same." *Olsen* v. *Upsahl*, 69 Ill. 273. Cases sometimes arise, in which a number of persons are engaged in a common object, and an injury is inflicted by an individual, without intentional concurrence on the part of the others, or even without intention on the part of the individual who inflicts the injury, and yet the whole number engaged in the common object are held jointly liable for the damages sustained by the injured party. *Vosburg* v. *Moak*, 1 Cush. 453.

An officer cannot lawfully command others to commit a wrongful act, and if he does and they obey him, they will be liable as trespassers. *Elder* v. *Morrison*, 10 Wend. 128; *Batchelder* v. *Whitcher*, 9 N. H. 239; *Wilson* v. *Franklin*, 63 N. C. 259. But if a party directs an officer to do something which the officer may rightfully do, though it is unlawful as to the party, as to levy on goods under an execution, valid on its face, but unauthorized by a judgment, the latter will alone be liable. *Coats* v. *Darby*, 2 N. Y. 517. So, if a person assists an officer in the execution of valid process, and the officer subsequently abuses his authority, the misconduct of the officer will not make such person a trespasser (*Oystead* v. *Shed*, 12 Mass. 505; *Wheelock* v. *Archer*, 26 Vt. 380); nor will a person who aids an officer, in good faith, be liable for any illegal act of the officer in which the person took no part, and to which he did not assent. *Johnson* v. *Stone*, 40 N. H. 197.

§ 9. **Ratification of trespass.** When a person does a thing for another without previous engagement or authority from the other, it becomes the act of the latter if ratified by him, and he will be responsible for all the consequences which follow, to the same extent that he

would have been if the act had been done by his express direction. But the fact that a person afterward approved of a trespass committed by another will not make him liable, unless the wrong was originally committed in such person's name or for his use. *Grund* v. *Van Vleck*, 69 Ill. 478. This distinction was anciently taken. Thus, it is said in the year book (Hen. 4, Fol. 35), that if a bailiff take a heriot claiming property in it himself, the subsequent agreement of the lord will not amount to a ratification of his authority as bailiff; but if he take it as bailiff of the lord, and not for himself, without, however, any command of the lord, yet the subsequent ratification by the lord makes him bailiff at the time. But to make a person liable for a trespass committed in his name, and for his benefit, it must be shown that he adopted the act with a knowledge of its character, or else that he took the benefit of it without inquiry. *Roe* v. *Birkenhead*, 7 Exch. 36; *Wilson* v. *Barker*, 4 B. & Ad. 614; 1 Nev. & M. 409.

§ 10. **Acts under government, statute, or military authority.** Acts of the public authorities, which are not expressly sanctioned by any special provision of law, are often justified upon principles of necessity, though the same acts, if committed by private persons, would be deemed aggravated trespasses. Of this character are sanitary and police regulations, the enforcement of which, in some instances, endanger the lives and health of individuals, and must always more or less affect property, and abridge personal liberty. *Spalding* v. *Preston*, 21 Vt. 9. See *Defenses*, tit. *Martial Law*.

A person whose authority is wholly derived from statute must pursue the statute strictly, and if he deviate from it, his acts will be void, and he will become a trespasser. This rule is not only applicable to inferior courts, but also to corporations created for private and special purposes, and to all persons who assume to act under a special and limited power conferred by law. *Williams* v. *Brace*, 5 Conn. 190; *Robinson* v. *Dodge*, 18 Johns. 351; *Cate* v. *Cate*, 44 N. H. 211. Where the captain of a company imposed a fine upon a soldier, and issued a warrant for its collection, under which the soldier was imprisoned, and it appeared that the statute conferred no authority upon the captain to issue warrants for the collection of fines in such cases, it was held, in an action of trespass brought by the soldier against the captain, that the plaintiff was entitled to recover. *Mallory* v. *Bryant*, 17 Conn. 178. If land is taken for public use, the statute directing it must be strictly construed, and the mode pointed out for ascertaining and paying the compensation be followed, or all concerned will be liable as trespassers. *N. Y. & H. R. R. Co.* v. *Kip*, 46 N. Y. 546; 7 Am.

Rep. 385; *Brown* v. *Powell*, 25 Penn. St. 229; *Trumpler* v. *Bemerly*, 39 Cal. 490; *Hannibal Bridge Co.* v. *Schaubacker*, 49 Mo. 555.

Although courts of common law will not interfere in relation to the acts of military officers within their jurisdiction, affecting military discipline, yet it is otherwise, as to the malicious exercise by a military officer of his authority, as well as to the acts of such an officer in excess of his authority, though committed without malice. *Darling* v. *Bowen*, 10 Vt. 148; *Tyler* v. *Pomeroy*, 8 Allen, 480; *French* v. *White*, 4 W. Va. 170. A lieutenant and a private in the United States army, who took from a person two horses by order of the captain, were held trespassers. *Wilson* v. *Franklin*, 63 N. C. 259. When a soldier on parade discharges a gun by order of his commanding officer, and a person is injured, such person may recover to the extent of his damage. *Cole* v. *Fisher*, 11 Mass. 137. In times of great public peril, the acts of military officers occupying responsible positions will be regarded with indulgence. *Clow* v. *Wright*, Brayt. 118; *Hawley* v. *Butler*, 54 Barb. 490; *Hickey* v. *Huse*, 56 Me. 493. An action of trespass cannot be maintained for an injury committed by order of a military officer in a case of extreme necessity. *Barrow* v. *Page*, 5 Hayw. 97. The defendant may show that the alleged trespass was committed under the orders of a military officer to aid in suppressing a rebellion. *Hess* v. *Johnson*, 3 W. Va. 645. When the defendant alleges in justification that he acted pursuant to the command of his superior officer, he need not prove the commission of the officer, but may show that the latter was in command as an officer, and recognized as such. *Hardage* v. *Coffman*, 24 Ark. 256.

§ 11. **Acts under legal process.** When an officer acts as a volunteer, he is bound to show that the process was legal and sufficient. *Hunt* v. *Ballew*, 9 B. Monr. 390. If he is engaged in a conspiracy, the process, though regular on its face, issued by a court having jurisdiction, and regularly returned, will not protect him. *Slomer* v. *People*, 25 Ill. 70. It is therefore erroneous in an action of trespass against an officer, to exclude evidence tending to show that the defendant used his office as a cloak to commit the alleged injury. *Wilding* v. *Hough*, 37 Iowa, 446. When an execution, issued upon a judgment rendered by a court having jurisdiction, is placed in the hands of an officer, he is not bound to inquire as to the service of the original writ. *Smith* v. *Bowker*, 1 Mass. 76; *Averett* v. *Thompson*, 15 Ala. 678; *Wilton Manf. Co.* v. *Butler*, 34 Me. 431. And he may justify under the execution without proving the judgment, unless he is asserting a *quasi* title by virtue of the levy as against a person other than the judgment debtor. *Shaw* v. *Davis*, 55 Barb. 389; *Mower* v. *Stickney*, 5 Minn. 397. An

execution which is voidable only will protect both the officer and the person who caused it to be issued. *Cogburn* v. *Spence*, 15 Ala. 549; *Wilmarth* v. *Burt*, 7 Metc. 257; *Batchelder* v. *Currier*, 45 N. H. 460. So an execution which is unsatisfied on its face, though satisfied in fact, will protect the officer acting under it if he have no knowledge of its satisfaction. *Thrower* v. *Vaughan*, 1 Rich. 18. And he will not be liable, if he proceed in good faith to serve an execution, after being told by the defendant that an appeal has been taken. *Foster* v. *Wiley*, 27 Mich. 244. See *Defenses*, title *Execution*.

§ 12. **Abuse of process.** A party who causes process to be issued without jurisdiction is liable as a trespasser (*Sprague* v. *Birchard*, 1 Wis. 457; *Stone* v. *Chambers*, 1 Strobh. 117; *Merritt* v. *Read*, 5 Denio, 352); but not for the irregular execution of his process, unless he commands or sanctions it. *Abbott* v. *Kimball*, 19 Vt. 551; *Adams* v. *Freeman*, 9 Johns. 117; *West* v. *Shockley*, 4 Harring. (Del.) 287. If, after process has been fully executed, the officer continues to act under it by direction of the plaintiff, they will both be trespassers. *Collins* v. *Waggoner*, Breese, 51. When, however, the party does not exercise any control over the officer, but requires him to proceed at his peril, and the officer mistakes the law in deciding as to his official duty, whereby he becomes a trespasser, the party is not liable unless he subsequently consents to or adopts the officer's course. *Hyde* v. *Cooper*, 26 Vt. 552. A person who causes the property of another to be seized under a void attachment is liable for all the injury resulting therefrom; the officer being deemed, in such case, the agent or servant of the party in whose favor the process is issued. *Kerr* v. *Mount*, 28 N. Y. 659. So, where property wrongfully taken on execution is sold by an officer, upon being indemnified by a subsequent execution creditor, the latter is liable as indemnitor and director of the officer, as an original trespasser, for the full value, notwithstanding the proceeds of the sale went to satisfy the first execution. *Weber* v. *Ferris*, 2 Daly, 404; 37 How. 102.

Parties who have proceeded ignorantly under void process may be liable as trespassers, notwithstanding they intended to act with entire propriety. At the same time, courts will scarcely hesitate to sustain process where, without violence to the ordinary usages of language, it can be so understood as to render it legal and operative. *Kelly* v. *Gilman*, 29 N. H. 385.

§ 13. **Acts of judicial officers.** The rule applicable to the liability of judicial officers for an injury caused to another is, that when they proceed beyond the limits of their authority in a given case, they subject themselves to an action for damages, and any decision they may render will be absolutely void; but that they incur no liability for an

error of judgment in a matter within their cognizance and in relation to which they have acquired jurisdiction over the parties in the mode prescribed by law. *Hamond* v. *Howell*, 1 Mod. 184; *Doswell* v. *Impey*, 1 B. & C. 163. See *Defenses*, title *Judicial Proceedings.*

§ 14. **Who protected by legal process.** In general, an officer, in order to be protected by process regular on its face, notwithstanding irregularity in the proceedings, is only required to take care that the process is in due form, and issued by a court having jurisdiction of the matter. *Cameron* v. *Lightfoot*, 2 W. Bla. 1190; *Belk* v. *Broadbent*, 3 Term R. 183; *Nason* v. *Sewall*, Brayt. 119; *Tarlton* v. *Fisher*, 2 Doug. 671; *Wilmarth* v. *Burt*, 7 Metc. 257; *Kerr* v. *Mount*, 28 N. Y. 659; *Wilton Manuf. Co.* v. *Butler*, 34 Me. 431. The fact that the officer has private knowledge that there is no cause of action will not make him liable (*Bell* v. *Broadbent*, 3 Term R. 183; *Grumon* v. *Raymond*, 1 Conn. 40; *Brainard* v. *Head*, 15 La. Ann. 489); it being no part of an officer's duty to decide on the truth or the sufficiency of the plaintiff's claim. *Watson* v. *Watson*, 9 Conn. 140. If, however, it appears, on the face of the process, that the court issuing it is without jurisdiction, or the want of jurisdiction arises from a fact of public notoriety, which is presumed to be equally within the knowledge of the officer as of others, and of which he is therefore bound to take notice, the officer will be a trespasser if he executes it. *State* v. *Mann*, 5 Ired. 45; *Parker* v. *Walrod*, 16 Wend. 514; *Sprague* v. *Birchard*, 1 Wis. 457. See *post*, 112, art. 11, § 3.

§ 15. **Indemnifying innocent wrong-doer.** A person who seeks re-imbursement for a loss resulting from his immoral or illegal act will obtain no help from the court. Where, therefore, one of two joint wrong-doers has been compelled to pay the whole damages, he cannot enforce contribution against the other. *St. John* v. *St. John's Church*, 15 Barb. 346. But the rule is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act. *Adamson* v. *Jarvis*, 4 Bing. 66; *Howe* v. *Buffalo, N. Y. & E. R. R. Co.*, 37 N. Y. 297. If an act directed or agreed to be done is not known to the person doing it to be unlawful, a promise of indemnity will be valid. *Merryweather* v. *Nixan*, 8 Term R. 186; *Turner* v. *Jones*, 1 Lans. 147; *Payson* v. *Whitcomb*, 15 Pick. 212; *Drummond* v. *Humphreys*, 39 Me. 347. And where A enters into a valid agreement with B to indemnify him against a trespass, and B, having employed third persons to do the act, is compelled to pay them damages recovered against them therefor, B is entitled to re-imbursement from A. *Stone* v. *Hooker*, 9 Cowen, 154.

## ARTICLE II.

### WHO MAY SUE.

**Section 1. In general.** A person is entitled to maintain an action of trespass not only for an injury directly and forcibly inflicted, but also for a forcible injury effected by means flowing from the act of another, but not operating by the very force and impulse of that act. *Waterman* v. *Hall*, 17 Vt. 128. It has been seen, *ante*, p. 44, § 1, that an injury resulting from negligence may render the party liable in trespass. *Percival* v. *Hickey*, 18 Johns. 257; *Rhodes* v. *Roberts*, 1 Stew. 145; *Newsorn* v. *Anderson*, 2 Ired. 42; *Brennan* v. *Carpenter*, 1 R. I. 474. Indeed, when the negligence is gross, trespass is the only proper remedy. *Scott* v. *Bay*, 3 Md. 431. See *post*, pp. 74, 95, arts. 5 and 9.

§ 2. **Joinder of plaintiff.** As a general rule tenants in common of personal property must join in an action for an injury to it. If one of them die after the commission of the trespass, the right of action survives to the co-tenants of the deceased, who must pay over to his personal representatives his share. *Bucknam* v. *Brett*, 35 Barb. 596. One of them cannot release, discharge, or settle the entire cause of action, though he may settle for his portion of the damages. *Gock* v. *Keneda*, 29 Barb. 120; *contra: Bradley* v. *Boynton*, 22 Me. 287. In relation to the joinder of tenants in common of real estate, see *post*, p. 78, art. 5, § 2.

## ARTICLE III.

### WHO MAY BE SUED.

**Section 1. In general.** Every direct and forcible invasion of another's right, whether by an injury to his person, personal property or real estate, will subject the wrong-doer to an action of trespass. For a further consideration of this subject, see *post*, pp. 78, 109, 115, arts. 6, 10 and 12.

§ 2. **Joinder of defendants.** When a trespass is committed by several, they may be sued either jointly or severally (*Allen* v. *Craig*, 1 Green, 294); or an action of trover may be brought against one, trespass against another, and detinue against a third, if the possession of the latter was obtained through his tortious acts. Judgment against one of the wrong-doers in either of these actions will not bar a recovery against the others. *Du Bose* v. *Marx*, 52 Ala. 506. Where all are included in the action, it is not a ground for arrest of judgment, that one was not served with process and did not answer. *Rose* v. *Oliver*, 2 Johns. 365. Although a mere recovery against one will not bar an

action against the others (*Day* v. *Porter*, 2 M. & Rob. 151; *Thomas* v. *Rumsey*, 6 Johns. 26; *Sheldon* v. *Kibbe*, 3 Conn. 214; *Knott* v. *Cunningham*, 2 Sneed, 204); yet, satisfaction will (*Bird* v. *Randall*, 3 Burr. 1345; *Morton's Case*, Cro. Eliz. 30; *Page* v. *Freeman*, 19 Mo. 421; *McGehee* v. *Shafer*, 15 Tex. 198); and it has been held that the taking out of execution against one will discharge the rest. *Fleming* v. *McDonald*, 50 Ind. 278; 19 Am. Rep. 711. To entitle the plaintiff to a verdict against all as joint trespassers, it must appear that they acted in concert. But it will not be material that they had unequal interests in the avails of the trespass; since those who confederate to do an unlawful act are deemed guilty of the whole, notwithstanding their share in the profits may be small. *Williams* v. *Sheldon*, 10 Wend. 654; *McIntyre* v. *Green*, 36 Ga. 48; *Vosburgh* v. *Moak*, 1 Cush. 453; *Williamson* v. *Fischer*, 50 Mo. 198. With reference to the persons who may properly be joined as defendants, it will be sufficient to say that he who is present at the commission of a trespass, encouraging or inciting it in any way, whether by words, gestures or looks, will be liable as a principal; and that proof that a person was present at a trespass is evidence from which the jury may infer that he aided and abetted it. *McManus* v. *Lee*, 43 Mo. 206; *Clark* v. *Bales*, 15 Ark. 452. But if he was simply a looker on, without doing any thing to countenance or approve the wrong, he will not be liable, because he did not actively endeavor to restrain the others. *Brown* v. *Perkins*, 1 Allen, 89.

§ 3. **Trespass by married women.** At common law, when a tort is committed by the wife, the husband is liable therefor, even though they be living apart, unless they are separated by a judicial decree; and the action must be brought against them both. *Head* v. *Briscoe*, 5 C. & P. 484; *Whitmore* v. *Delano*, 6 N. H. 543; *Kowing* v. *Manly*, 57 Barb. 479; 49 N. Y. (4 Sick.) 192; *Baker* v. *Young*, 44 Ill. 42. If the wrongful act be done by the wife in the presence of her husband, she is excused, the law presuming coercion on his part. But such presumption may be rebutted by proof. *Keyworth* v. *Hill*, 3 B. & Ald. 685; *Cassin* v. *Delany*, 38 N. Y. 178; *Marshall* v. *Oakes*, 51 Me. 308. When the husband is deceased, or civilly dead, the wife may be sued alone, although the tort was committed by her at the instigation of her husband. 2 Bac. Abr. 13, tit. *Baron & Feme*; *Vine* v. *Saunders*, 4 B. & C. 102; 4 Bing. N. C. 96.

§ 4. **Trespass by infant.** A minor, who has arrived at the age of discretion, is liable for his tortious acts, and the father cannot be made responsible for them when done in his absence and without his authority or approval (*Tift* v. *Tift*, 4 Denio, 175; *Burnham* v. *Holt*, 14 N.

H. 367); though it would be otherwise as to the latter, if he were present and did nothing to restrain his child from committing the injury. *Strohl* v. *Levan*, 39 Penn. St. 177. It has, however, been held that an action of trespass may be maintained against an infant, although he did the act by command of his father. *Scott* v. *Watson*, 46 Me. 362, MAY, J., *dissenting*.

§ 5. **Trespass by servant.** When a trespass is committed by a servant in the course and within the scope of his employment, it will be presumed that he acted by authority of his master, and the latter will be liable. The liability of the master to be sued in trespass in such case does not rest upon the relationship of master and servant, but upon the fact that the act was done by the master's direction and command, and so, in reality, was the master's act. *Seymour* v. *Greenwood*, 6 H. & N. 359; 7 id. 355; *Hawks* v. *Charlemont*, 107 Mass. 414; *Goddard* v. *Grand Trunk R. R.*, 57 Me. 202; 2 Am. Rep. 39; *Thames Steamboat Co.* v. *Housatonic R. R. Co.*, 24 Conn. 40; *Weed* v. *Panama R. R. Co.*, 17 N. Y. 362. The implied authority of the servant has been held to be limited to those acts which the master could himself do if personally present. *Isaacs* v. *Third Av. R. R. Co.*, 47 N. Y. 122; 7 Am. Rep 418; *Poulton* v. *L. & S. W. R. R. Co.*, 2 L. R., Q. B. 534. But if the servant, at the time of committing the wrong, is not acting within the scope of his master's employment, the master will not be liable, but only the servant. *Huzzey* v. *Field*, 2 Cr. M. & R. 432, 440; *Mali* v. *Lord*, 39 N. Y. 381; 7 Trans. App. 174.

The owner or occupier of land is responsible to third persons for an injury caused by those who are employed by him to work on the land, whether they are hired directly by him or by his agent. If, therefore, while thus employed, they trespass upon another's land, the employer is liable therefor. *Bush* v. *Steinman*, 1 Bos. & Pull. 404; *Hill* v. *Morey*, 26 Vt. 178; *Luttrell* v. *Hazen*, 3 Sneed, 20. But no presumption will arise against the employer from the fact that he omitted to forbid the acts, in the absence of proof that he knew that his employees had committed or intended to commit them. *Church* v. *Mansfield*, 20 Conn. 284.

§ 6. **Trespass by agent.** When an agent in the course of his employment commits a trespass, his principal is liable notwithstanding he did not authorize or know of the wrongful act, or even though he forbade it; the ground of the principal's liability being that he placed the agent in a position which afforded him the means of doing the injury. *Lane* v. *Cotton*, 12 Mod. 472; *Croft* v. *Alison*, 4 Barn. & Ald. 590; *Harris* v. *Nicholas*, 5 Munf. 483; *Brown* v. *Purviance*, 2 Harr. & Gill. 316; *Kerns* v. *Piper*, 4 Watts, 222; *Phila. R. R.*

*Co.* v. *Derby*, 14 How. 468; *Hunter* v. *Hudson River Iron Co.*, 20 Barb. 493; *Southwick* v. *Estes*, 7 Cush. 385.

§ 7. **Trespass by deputy sheriff.** A sheriff is liable for a trespass committed by his deputy in the course of his employment, without showing any command, consent or approval, by the sheriff, the sheriff and his deputy being considered in law but one officer. *Ackworth* v. *Kempe*, Dougl. 40; *McIntyre* v. *Trumbull*, 7 Johns. 35; *Grinnell* v. *Phillips*, 1 Mass. 530; *Pratt* v. *Bunker*, 45 Me. 569. The liability of the sheriff for all of the official acts of the sheriff in executing process has been held to exist, although the sheriff did not know that the deputy had the process. *Campbell* v. *Phelps*, 17 Mass. 244; *People* v. *Schuyler*, 4 N. Y. 173. The injured party may, at his election, bring his action either against the deputy, or against the sheriff, and on the trial prove that the trespass was committed by the deputy; or he may in his action against the sheriff declare specially, alleging that the wrong was committed by the deputy. *Walker* v. *Foxcroft*, 2 Me. 270; *Taft* v. *Metcalf*, 11 Pick. 456. Although the sheriff and his deputy are not joint trespassers in any tortious act of the latter alone, so as to make them liable either to a joint action, or to entitle the party to an action against one, after having recovered judgment and sued out execution against the other, yet when the sheriff personally interferes, he and his deputy become joint trespassers independently of the official relation existing between them. *Waterbury* v. *Westervelt*, 9 N. Y. 598.

§ 8. **Trespass by officers or agents of corporations.** An action of trespass may be maintained against a corporation at common law for wrongful acts committed by its command, or under its authority. *Lyman* v. *White River Bridge Co.*, 2 Aiken, 255; *Main* v. *North Eastern R. R. Co.*, 12 Rich. 82; *Lee* v. *Village of Sandy Hill*, 40 N. Y. 442. Thus, an action will lie against a town or city for a trespass committed under its authority upon the real estate of another. *Allen* v. *Decatur*, 23 Ill. 332; *Peck* v. *Ellsworth*, 36 Me. 393; *Hildreth* v. *City of Lowell*, 11 Gray, 345. So an action of trespass may be maintained against a corporation for unlawfully taking and appropriating personal property. *Maund* v. *Monmouthshire Canal Co.*, 1 Car. & M. 606.

Where a corporation gives an order to a servant to do an act which implies the use of force and personal violence to others, if the servant, in the execution of that service, goes beyond proper limits as to the use of force, and commits a trespass by unjustifiable violence, the corporation will be liable to an action therefor. *Goff* v. *Gt. North. R. R. Co.*, 3 El. & El. 672; 30 L. J. Q. B. 148; *Passenger R. R. Co.* v. *Young*, 21 Ohio, 518; 8 Am. Rep. 78; *Jackson* v. *Second Ave. R.*

*R. Co.*, 47 N. Y. 274; 7 Am. Rep. 448; *St. Louis, Alton & Chicago R. R. Co.* v. *Dalby*, 19 Ill. 353; *Phila. & Reading R. R. Co.* v. *Derby*, 14 How. 468; *Ramsden* v. *Boston, etc., R. R. Co.*, 104 Mass. 117; 6 Am. Rep. 200. And the corporation has been held liable for a personal injury inflicted by persons whom the servant called to his aid, although they were forbidden by the servant to commit the violence. *Coleman* v. *N. Y. & New Haven R. R. Co.*, 106 Mass. 160. If a railroad conductor ejects a passenger from the cars when the train is in motion, or employs undue violence, or subjects the passenger to needless injury in any other way, the company may be made responsible in damages, although such person had no right on the train. *Law* v. *Illinois, etc., R. R. Co.*, 32 Iowa, 534; *Mobile, etc., R. R. Co.* v. *McArthur*, 43 Miss. 180. Where the employees of a railroad company willfully refuse to perform their duty, the company is liable for damages caused by the detention of freight. *Blackstock* v. *N. Y. & Erie R. R. Co.*, 20 N. Y. 48.

A corporation cannot absolve itself, by contract, from responsibility for the willful misconduct of its directors, they being the only medium of communication by the corporation with third persons. The rule is not confined to common carriers and other bailees, but is general in its application. *Perkins* v. *N. Y. Cent. R. R. Co.*, 24 N. Y. 196.

The president of a corporation is not liable for the wrongful acts of an agent to whom the former transmits the orders of the corporation as to the removal of persons from the premises of the corporation who have no right to be there, unless the orders emanate from the president personally. *Hewitt* v. *Swift*, 3 Allen, 420. When the proceedings of a corporate meeting are regular and legal, and within the legitimate powers of the body, persons are not trespassers who, in the proper discharge of duty, assist in carrying them into effect, although the real purpose of a majority of the voters was, to accomplish an illegal object. *Bartlett* v. *Kinsley*, 15 Conn. 327.

§ 9. **Trespass by partners.** An action of trespass may be maintained against the members of a copartnership, when the wrongful act is committed by them, or by their agents, employees, or servants, in the course of the business of the firm. *McKnight* v. *Ratcliff*, 44 Penn. St. 156. When, however, one of the partners commits a trespass beyond the scope and business of the partnership, the other partners are not liable, unless they afterward sanction the transaction. *Petrie* v. *Lamont*, 1 Car. & M. 93; *Taylor* v. *Jones*, 42 N. H. 25.

§ 10. **Trespass in the case of executors.** The common-law doctrine, that torts die with the person, and that an action of trespass cannot be maintained by or against an executor or administrator for wrongs

committed by or to his testator or intestate, has been changed by statute, in some of the States, permitting an action for wrongs done to the property, rights, or interests, of another to be brought by or against the personal representatives. See *Whiton* v. *Chicago, etc., R. R. Co.*, 21 Wis. 305; *Whitcomb* v. *Cook*, 38 Vt. 477.

§ 11. **Trespass in acting under a statute.** Allusion has been made *ante*, p. 49, § 10, to the rule that unless persons whose powers are derived solely from statute, confine themselves strictly to the authority which the statute has conferred, they become trespassers. See *Smith* v. *Rice*, 11 Mass. 507; *People* v. *White*, 24 Wend. 520; *Allen* v. *Gray*, 11 Conn. 95; *Blood* v. *Sayre*, 17 Vt. 609; *Cate* v. *Cate*, 44 N. H. 211.

If a magistrate were to issue process which was illegal, and not merely erroneous, or attempt to enforce a proceeding founded on any judgment, sentence, or conviction, in a matter over which he had no jurisdiction, he would thereby make himself amenable to an action for damages. *Bigelow* v. *Stearns*, 19 Johns. 39. The trustees of a school district who issued their warrant to collect a tax the amount of which had not been specified by the district meeting, as required by law, were held trespassers. *Robinson* v. *Dodge*, 18 Johns. 351. And the mayor of a city who, by direction of the common council, signed and issued a warrant for the collection of an illegal assessment, was held liable to an action of trespass for the taking of property under the warrant. *Williams* v. *Brace*, 5 Conn. 190. This kind of liability is often incurred by justices of the peace, who, having a special and limited jurisdiction, have always been held to a strict accountability to individuals, for injury resulting from illegal acts in the execution of their powers and duties; and the liability includes all who directly and knowingly participate in the illegal acts. *Schermerhorn* v. *Tripp*, 2 Caines, 108; *Sullivan* v. *Jones*, 2 Gray, 570; *Russell* v. *Perry*, 14 N. H. 152; *Poulk* v. *Slocum*, 3 Blackf. 421. But an error of judgment as to the admissibility of evidence presented on an application to a justice for an attachment which he issues, will not make him a trespasser; though it is otherwise if he act wholly without evidence. *Vosburgh* v. *Welch*, 11 Johns. 175. So, a mistake as to the right process, in a matter over which he has jurisdiction, or irregularity in the form of process issued by him, will not render him liable. *Houlden* v. *Smith*, 14 Q. B. 841; *Stanton* v. *Schell*, 3 Sandf. 323; *Lancaster* v. *Lane*, 19 Ill. 242; *Com.* v. *Henry*, 7 Cush. 512.

§ 12. **Damages.** The law presumes damage from every trespass (*Fullam* v. *Stearns*, 30 Vt. 443; *Atwood* v. *Fricot*, 17 Cal. 37); and the wrong-doer will be held to have contemplated all the damages which legitimately result from his wrongful act, though the injury done is

greater than he intended. *Allison* v. *Chandler*, 11 Mich. 542. When the trespass was involuntary, the damages should be confined to recompense for the actual injury sustained. *Beecher* v. *Derby Bridge and Ferry Co.*, 24 Conn. 491. If the amount of the injury can be accurately ascertained, the verdict must be for the whole damage. *Henderson* v. *Syles*, 2 Hill (S. C.), 504. When future injury will necessarily result from the wrongful act, it may be taken into consideration in estimating the damages. *Fetter* v. *Beal*, 1 Ld. Raym. 339; *Richardson* v. *Mellish*, 2 Bing. 229; *Caldwell* v. *Murphy*, 11 N. Y. 416. If special damages be alleged, they may be proved so far as they are the proximate, though not the necessary consequence of the trespass. *Brown* v. *Cummings*, 7 Allen, 507; *Damron* v. *Roach*, 4 Humph. 134; *Snively* v. *Fahnestock*, 18 Md. 391. But remote, or speculative damages, or such as the party injured might easily have avoided, cannot be allowed (*Loker* v. *Damon*, 17 Pick. 284); and the allowance by the jury of interest on damages assessed by them, is improper. *Jean* v. *Sandiford*, 39 Ala. 317. Every circumstance calculated to enhance the injury may enter into the question of the amount of the damages. *Humphries* v. *Johnson*, 20 Ind. 190. When the act was willful and unprovoked, or characterized by malice, insult, wantonness, or cruelty, exemplary damages may be given. *Duncan* v. *Stalcup*, 1 Dev. & Batt. 440; *Wilkins* v. *Gilmore*, 2 Humph. 140; *Jay* v. *Almy*, 1 Woodb. & Minot, 262; *Amer* v. *Longstreth*, 10 Penn. St. 145; *Mitchell* v. *Billingsley*, 17 Ala. 391; *Hawk* v. *Ridgway*, 33 Ill. 473; *Dibble* v. *Morris*, 26 Conn. 416; *Lane* v. *Wilcox*, 55 Barb. 615. Such damages are sometimes made to include the necessary expenses of the plaintiff in the suit. *Cleveland, etc., R. R. Co.* v. *Bartram*, 11 Ohio St. 457; *Williams* v. *Ives*, 25 Conn. 568; *Blythe* v. *Tompkins*, 2 Abb. Pr. 468; *Parsons* v. *Harper*, 16 Gratt. 64.

When several are joined as defendants, the damages should be assessed for the entire injury sustained; and each defendant will be liable for the whole, without regard to the extent of his guilt. *Brown* v. *Allen*, 4 Esp. 158; *Allen* v. *Craig*, 1 Green, 294; *Clark* v. *Bales*, 15 Ark. 452; *Hair* v. *Little*, 28 Ala. 236; *Berry* v. *Fletcher*, 1 Dillon, 67. But parties are only liable as joint defendants for a trespass jointly committed. *Folyer* v. *Fields*, 12 Cush. 93. When it appears that one of them did not act with malice or recklessness, exemplary damages cannot be recovered against him. *Becker* v. *Dupree*, 75 Ill. 167. Although when the plaintiff, who has brought separate actions against joint trespassers, takes out execution against one of them, he is in general concluded by it, yet he may elect to take the largest sum recovered, or to proceed against the solvent defendants, or if any one of them cannot

pay the whole of the judgment rendered against him, may accept part satisfaction from one, and look to the others for the balance of his full legal compensation. *United Soc.* v. *Underwood*, 11 Bush, 265; 21 Am. Rep. 214.

## ARTICLE IV.

### TRESPASS ON REAL ESTATE.

**Section 1. In general.** A person cannot lawfully go on to another's land without his permission; and he commits a trespass by so doing. Such an entry constitutes a violation of the owner's right of property, for which an action will lie, whether the land be inclosed or not, and although no actual injury be done (*Merest* v. *Horvey*, 5 Taunt. 442; *Dougherty* v. *Stepp*, 1 Dev. & Batt. 371; *McCall* v. *Capehart*, 20 Ala. 521; *Norvell* v. *Gray*, 1 Swan, 96; *Pierce* v. *Hosmer*, 66 Barb. 345); and it makes no difference as to the character of the offense, that the land upon which the wrongful entry is made is covered with water. *Smith* v. *Ingram*, 7 Ired. 175. The trespass may be committed by means of an agent or servant. *Binda* v. *Benbow*, 11 Rich. 24; *Barden* v. *Felch*, 109 Mass. 154.

Where the defendant's stallion injured the plaintiff's mare by biting and kicking her through the fence separating the plaintiff's land from the defendant's, he was held liable in trespass apart from any question of negligence on the part of the defendant. *Ellis* v. *Loftus Iron Co.*, L. R., 10 C. P. 10; 11 Eng. R. 210. Vol. 1, p. 310.

§ 2. **What acts amount to a trespass.** It has been seen (*above*, § 1) that the law protects every one in the peaceable possession of his real estate, and entitles him to a recovery against every willful and intentional intruder. *Sears* v. *Lyons*, 2 Stark. 318; *Rogers* v. *Spence*, 13 M. & W. 571. Where a person entered the cellar of another in the day time, against the protest of the owner's daughter, and drew from a barrel therein some cider which he drank, it was held that, in the absence of the circumstances which usually accompany a felonious taking, it constituted a trespass. *McCourt* v. *People*, 64 N. Y. 583. Trespass will lie against a justice of the peace for "maliciously and corruptly, with intent to injure and oppress the plaintiff, and without probable cause," issuing a search warrant under which an officer forcibly entered the premises of the plaintiff, and carried away therefrom property. *Muse* v. *Vidal*, 6 Munf. 27. When an officer has effected an illegal entrance into a house, he cannot lawfully arrest the owner, or remove his goods, it being one continuous act. *Curtis* v. *Hubbard*, 4 Hill, 437; *Hooker* v. *Smith*, 19 Vt. 151. Bare suspicion that a felony has been

committed will not justify an officer, without a warrant, in breaking into a house to arrest the occupant, though a felony has actually been perpetrated. *State* v. *Smith*, 1 N. H. 346. Where a private person breaks and enters the outbuilding of another, it is no defense that the former was tenant in common with the latter of goods deposited therein, and that the breaking and entering were for the purpose of removing them. *Crocker* v. *Carson*, 33 Me. 436.

The removal of ornamental trees or of posts belonging to another, which are rightfully on the highway, is a trespass; and so is the wanton and unnecessary destruction of posts and bars which obstruct a highway, or of a stonewall which encroaches thereon (*Welsh* v. *Nash*, 8 East, 394; *Beardslee* v. *French*, 7 Conn. 125; *Burnham* v. *Hotchkiss*, 14 id. 311); also, the plowing up of land within the exterior lines of a highway, which land is a part of the adjacent lot. *Robbins* v. *Borman*, 1 Pick. 122. Where a tree stands directly upon the line between adjoining owners, so that the line passes through it, it is common property, and trespass lies if one of them cuts and destroys it without the consent of the other. *Griffin* v. *Bixby*, 12 N. H. 454; *Dubois* v. *Beaver*, 25 N. Y. (11 Smith) 123. But where a tree stands wholly upon the lands of a person, he is the owner of the whole tree, and is entitled to all its fruit, notwithstanding some of its branches overhang the lands of another person. *Hoffman* v. *Armstrong*, 40 N. Y. (3 Sick.) 201; 8 Am. Rep. 537. Vol. 1, p. 712. It constitutes a trespass to obstruct a river whereby a person is deprived of his right of free passage; and if the damage is personal to him, and such as is not also sustained by the public, he may maintain an action for the injury; otherwise, the remedy is by indictment. *Dimes* v. *Petley*, 15 Q. B. 276; *Rose* v. *Groves*, 5 M. & G. 613; *Dougherty* v. *Bunting*, 1 Sandf. 1. A by permission of B put timber into a ditch which divided their lands, to prevent a ditch on his own land from filling up. B afterward took the timber out of his half of the ditch, whereby sand was washed down and stopped up A's ditch, causing his land to be overflown. Held, that an action of trespass would lie therefor. *Hogwood* v. *Edwards*, Phill. (N. C.) 350. Where a person having sold to another the right to fish in a pond, draws out the water and destroys the fish, the grantee has his remedy by action; such conduct of the grantor in annulling his own grant being a misfeasance. *Pomfret* v. *Ricroft*, 1 Saund. 321.

A person may become a trespasser by the improper use of his own premises, as by excavating his soil so as to divert the natural flow of a stream from the land of the adjoining owner (*Van Hoesen* v. *Coventry*, 10 Barb. 518); or to displace a party wall (*Eno* v. *Delvecchio*, 6

Duer, 17; S. C., 4 id. 53); or to undermine the natural, lateral, or subjacent support of the land of his neighbor (*Humphries* v. *Brogden*, 1 Eng. L. & Eq. 241; *Farrand* v. *Marshall*, 19 Barb. 380); or to cast dirt or stones upon another's premises. *Hay* v. *The Cohoes Co.*, 2 N. Y. 159. The trespass may be committed by placing a spout on his house which throws the water on to the adjoining land; or by permitting a stick of timber used in the construction of his house, to fall on his neighbor's dwelling (*Lambert* v. *Bessey*, T. Raym. 421; *Radcliff's Exrs.* v. *Mayor, etc., of Brooklyn*, 4 N. Y. 195); or by obstructing an ancient light. *Pickard* v. *Collins*, 23 Barb. 444. The liability may be incurred by erections which impair the enjoyment of life and property (*Carhart* v. *Gas-light Co.*, 22 Barb. 297); or by letting premises to be used in a way that proves injurious and offensive to others. *The King* v. *Pedly*, 1 Adol. & El. 822. Where the infringement of a right might ripen into an easement, it is a sufficient cause of action, though no perceptible injury has been sustained. *Wood* v. *Waud*, 3 Exch. 772; *Harrop* v. *Hirst*, L. R., 4 Exch. 43; *Rochdale Canal Co.* v. *King*, 14 Q. B. 138; *Amoskeag Manuf. Co.* v. *Goodale*, 46 N. H. 53. No part of a fence which is not on the dividing line can lawfully be placed on the land of the adjoining owner. *Warren* v. *Sabin*, 1 Lans. 79; *Hubbell* v. *Peck*, 15 Conn. 133. A person cannot, without permission, lawfully go upon his neighbor's land from which surface water runs upon his own, in order to divert the water from his land, although the water is likely to undermine the wall of his house, and the owner of the adjoining house, after being notified, has neglected to do any thing to prevent the apprehended injury. *Grant* v. *Allen*, 41 Conn. 156.

A person who continues an unlawful erection will subject himself to successive actions of trespass therefor (*Holmes* v. *Wilson*, 10 Ad. & E. 503; *Thompson* v. *Gibson*, 7 M. & W. 456; *Esty* v. *Baker*, 48 Me. 495); notwithstanding the payment of a judgment for such erection. *Russell* v. *Brown*, 63 Me. 203. Although if one should dig up the soil on another's land a recovery therefor would bar a second action, yet this would not be the case if an excavation were made by a person on his own land, the effect of which was to injuriously divert water from his neighbor's stream. *Clegg* v. *Dearden*, 12 Q. B. 576, 591. An obstruction which in the first instance is justifiable may, by being suffered to remain, make the party liable as a trespasser *ab initio*. *Elder* v. *Bemis*, 2 Metc. 599.

An action of trespass will lie for entering upon a fishery of which parties are in possession, disturbing the water, driving away the fish, and preventing the fishermen by force and violence from pursuing their calling (*Young* v. *Hichens*, 6 Q. B. 606; *Holford* v. *Bailey*, 13 Jur.

278; *Russell* v. *Stocking*, 8 Conn. 236); and taking and carrying away oysters from a bed planted by an individual is a trespass. *Lowndes* v. *Dickerson*, 34 Barb. 586. Vol. 1, p. 299.

§ 3. **What acts do not amount to a trespass.** It is not a trespass to take and appropriate private property to public use without the consent of the owner, in cases of public necessity or convenience, provision being made for compensation (*Heyward* v. *Mayor of N. Y.*, 7 N. Y. 314; *Osborn* v. *Hart*, 24 Wis. 89; 1 Am. Rep. 161; *Crear* v. *Crossly*, 40 Ill. 175; *Bankhead* v. *Brown*, 25 Iowa, 540; *Memphis Freight Co.* v. *Memphis*, 4 Cold. 419; *Avery* v. *Fox*, 1 Abb. [U. S.] 246; *Com.* v. *Pittsburgh, etc., R. R. Co.*, 58 Penn. St. 26), nor to tear down a house in a town when it is necessary to do so to stop the spread of a fire (*Surocco* v. *Geary*, 3 Cal. 69; *Beach* v. *Trudgain*, 2 Gratt. 219; *American Print Works* v. *Lawrence*, 3 Zabr. 590; *Parsons* v. *Pettengell*, 11 Allen, 507), nor for the owner of land to tear down a building which has been erected thereon without his permission (*Davison* v. *Wilson*, 11 Q. B. 890; 17 L. J. Q. B. 196; *Burling* v. *Reed*, 19 id. 291; *Bolling* v. *Whittle*, 1 Ala. 268; *Beers* v. *St. John*, 16 Conn. 322), or to remove therefrom personal property which is not rightfully there (*Slater* v. *Swann*, 2 Str. 871; *Ambergate, etc., R. R. Co.* v. *Mid. R. R. Co.*, 2 El. & Bl. 793; *Rea* v. *Sheward*, 2 M. & W. 424), nor to enter another's premises and abate a nuisance which deprives the person entering of the reasonable enjoyment of some right (*Davies* v. *Mann*, 10 M. & W. 546; *Pilcher* v. *Hart*, 1 Humph. 524; *Amoskeag Manuf. Co.* v. *Goodale*, 46 N. H. 53; *Peckham* v. *Henderson*, 27 Barb. 207), or to remove an obstruction by which a stream is prevented from flowing in its natural channel. *Strong* v. *Benedict*, 5 Conn. 210. It is not a trespass to go on to another's land to save the property of the latter, nor when the entry is caused by necessity, as where a highway is impassable, or a person is in danger of his life. *Bullard* v. *Harrison*, 4 M. & S. 387; *Taylor* v. *Whitehead*, 2 Doug. 745; *Holmes* v. *Seely*, 19 Wend. 507. Without a prescriptive right, a person by erecting a house near the boundary line of his land acquires no right of support from the adjoining land, and the owner of the latter may lawfully excavate the same in order to erect a building thereon; and even if he is guilty of negligence in not giving the other party notice, or in making the excavation in an improper manner, he will not be liable as a trespasser. *Mamer* v. *Lussem*, 65 Ill. 484. Vol. 1, p. 144; 2 id. 720; 3 id. 709; 4 id. 437.

Where the owners of adjoining land have agreed upon the division line, one of them cannot be liable in trespass for acts done by him on his side of the line thus established, unless there has been a revocation

of the agreement. *Palmer* v. *Anderson*, 63 N. C. 365. If the land of a debtor be fraudulently held and cultivated for the purpose of keeping the crops out of the hands of his creditors, a purchaser of the crops, which are sold for the debts, does not commit a trespass by entering and taking them away. *Thompson* v. *Craigmyle*, 4 B. Monr. 391. Where a creditor to whom land is set off on execution cuts grass upon the land, and after reconveying his interest in the land, removes the hay, he is not liable as a trespasser, his possession having been lawfully acquired. *Drown* v. *Foss*, 39 N. H. 525. An action of trespass for cutting down and carrying away timber cannot be maintained against a person in actual possession of the land either by himself or a tenant. In such case the appropriate remedy is ejectment. *More* v. *Perry*, 61 Mo. 174. One who has a right to go on to land does not commit a trespass by entering contrary to the wish of the occupant. *Walton* v. *File*, 1 Dev. & Batt. 567; *Yeates* v. *Allen*, 2 Dana, 134. The owner of land who prevents another from using the water of a well on the land, which the latter has a right to use, does not thereby commit a trespass. *Shafer* v. *Smith*, 7 Harr. & J. 67.

§ 4. **What title or interest plaintiff must have.** The plaintiff, in order to maintain the action, must prove possession actual or constructive, or possession of a part, under a deed of the whole; or if the land is unoccupied, that he has the title. *Smith* v. *Wilson*, 1 Dev. & Batt. 40; *Marr* v. *Boothly*, 19 Me. 150; *Heebner* v. *Chave*, 5 Penn. St. 115; *Grout* v. *Knapp*, 40 Vt. 163; *Edwards* v. *Noyes*, 65 N. Y. 125. Where the court charged the jury that "either the possession or the right to the possession will authorize an action of trespass for an injury to land," it was held error for the reason that the right to the possession and right of entry are synonymous, authorizing an action of ejectment, but not of trespass. *Polk* v. *Henderson*, 9 Yerg. 310. In order to enable the assignee of a lease to maintain an action for a trespass on the leasehold premises, he must have taken actual possession of them. *Harrison* v. *Blackburn*, 17 C. B. (N. S.) 678. The grantee of land must show an unequivocal occupancy, to extend the possession beyond the limits described in his deed, the owner of the adjoining lot being put off his guard by the conveyance as to any doubtful assertion of claim. *Shedd* v. *Powers*, 28 Vt. 652. A person must have the legal title before he can maintain an action of trespass against the grantee of the equitable estate. *Buck* v. *Gilson*, 37 Vt. 653. Title to land gives to the person who has it constructive possession so as to enable him to maintain trespass, unless there is an adverse possession or right in some one by contract or operation of law to the exclusion of the owner; though formerly, a right of property and a mere right of entry were not enough

for this purpose, but the party must have had actual possession. *Stearns* v. *Palmer*, 10 Metc. 32; *Chesley* v. *Brockway*, 34 Vt. 550; *Dejarnett* v. *Haynes*, 23 Miss. 600; *Griffin* v. *Creppin*, 60 Me. 270; *Wickham* v. *Freeman*, 12 Johns. 183; *Daisey* v. *Hudson*, 5 Harr. 320. Where a person enters upon land without any color of title, he is deemed in possession of no more than he actually occupies, and he must show that he had a prior possession of the exact places in which the alleged trespass was committed. *Moor* v. *Campbell*, 15 N. H. 208. Where a disseizor takes possession and puts the disseizee out, the former can alone recover for a direct injury to the land. But to constitute such a disseizin as will prevent the disseizee from maintaining trespass for acts done after the disseizin until a re-entry, the disseizor must have had exclusive possession. *Holcomb* v. *Rawlins*, Cro. Eliz. 540; *Caldwell* v. *Waters*, 22 Penn. St. 378; *Brown* v. *Ware*, 25 Me. 411; *Abbott* v. *Abbott*, 51 id. 575. After the disseizee has regained possession, he may maintain an action for the intermediate damages or mesne profits during the time of his tortious dispossession. *Graham* v. *Houston*, 4 Dev. 232; *Emerson* v. *Thompson*, 2 Pick. 473; *Stean* v. *Anderson*, 4 Harr. 209; *Frost* v. *Duncan*, 19 Barb. 560.

Entering on land and surveying it, or cutting timber, under a claim of title, on a lot designated by known and acknowledged metes and bounds, would be evidence of possession. *Sawyer* v. *Newland*, 9 Vt. 383; *Cobleigh* v. *Young*, 15 N. H. 493. Proof of a judgment in favor of the plaintiff in an action of ejectment, against a third person, would not make out a *prima facie* case of title sufficient to enable him to maintain the action (*Southington Soc.* v. *Gridley*, 20 Conn. 200); nor proof of the right to the use of water flowing over the land. *Nostrand* v. *Durland*, 21 Barb. 478. It may be shown on the part of the defendant that a third person, and not the plaintiff, was in possession at the time of the alleged trespass (*Chatham* v. *Brainerd*, 11 Conn. 60): as for instance, a tenant of the plaintiff. *Uttendorffer* v. *Suegers*, 50 Cal. 496; *Hugunin* v. *McCuniff*, 2 Col. 367.

§ 5. **What title or possession sufficient.** Mere possession of land, however recent, is a sufficient title to support an action of trespass against one who has not a better right. *Catteris* v. *Cowper*, 4 Taunt. 547; *Myrick* v. *Bishop*, 1 Hawks, 485; *Fletcher* v. *Cole*, 26 Vt. 170; *Tarry* v. *Brown*, 34 Ala. 159; *Inskeep* v. *Shields*, 4 Harring. 345; *Rood* v. *N. Y. & Erie R. R. Co.*, 18 Barb. 80; *Carney* v. *Reed*, 11 Ind 417; *Criner* v. *Pike*, 2 Head, 398; *Todd* v. *Jackson*, 2 Dutcher, 525; *Look* v. *Norton*, 55 Me. 103; *Kilbourne* v. *Rewee*, 8 Gray, 415; *Chicago* v. *McGraw*, 75 Ill. 566; *Darling* v. *Kelly*, 113 Mass. 29.

The rule under consideration is applicable to the case of the daughter

or female servant of the occupier of the house, in possession of a bedroom which is forcibly invaded. *Lewis* v. *Ponsford*, 8 Car. & P. 687. And it is enough that the plaintiff had possession when the injury was committed, though not in possession at the commencement of the action. *Smith* v. *Ingram*, 7 Ired. 175. A delivery of possession under a writ of *habere facias possessionem* will not constitute a defense for a previous trespass on the land. *Smith* v. *Guild*, 34 Me. 443. Where the plaintiff has a prior possession, he will be entitled to recover, notwithstanding the land has been sold and conveyed to the defendant. If a third person has acquired title by adverse possession against the defendant's grantor (*Hughes* v. *Graves*, 39 Vt. 359); improvements made on land, or the use of it for a long time for fuel and fencing materials, constitute a sufficient possession to enable a person to maintain trespass for encroachments (*Rogan* v. *Perry*, 6 Wis. 194; *McLean* v. *Farden*, 61 Ill. 106); but not the ranging of cattle on the land and the occasional cutting of a few trees thereon (*Morris* v. *Hayes*, 2 Jones [N. C.], 93); nor having the custody of the key of a house in order to get possession of personal property. *Davis* v. *Wood*, 7 Mo. 162. The owner of land which is vacant, or which is occupied by a tenant at will or at sufferance, may maintain trespass against a stranger. *Vanbrunt* v. *Schenck*, 11 Johns. 377; *Safford* v. *Basto*, 4 Mich. 406; *Kellenberger* v. *Sturtevant*, 7 Cush. 465; *Baker* v. *King*, 18 Penn. St. 138; *More* v. *Perry*, 61 Mo. 174. In an action for wrongfully entering on land, cultivating it without right, and committing waste, after the plaintiff had acquired title under a will, he need not allege that he had taken possession, or offered to do so. *Humphreys* v. *Merritt*, 51 Ind. 197. An allegation of the plaintiff in an action of trespass, that trees were converted, etc., cut and carried away from the land of the plaintiff, etc., states a good cause of action at common law, although it is not averred in terms that the trees were the property of the plaintiff. *Atlantic & Pacific R. R. Co.* v. *Freeman*, 61 Mo. 80. Where a person claiming to own a tract of land places a servant in a house on it, with the right to fire-wood, he has sufficient possession of the whole tract to maintain trespass against a mere wrong-doer for cutting timber on the land. *Lamb* v. *Swain*, 3 Jones, 370. The owner of a building, the rooms of which are let by him to a number of families, may maintain trespass if the building is destroyed. *Curtiss* v. *Hoyt*, 19 Conn. 154.

It has been stated, *ante*, p. 60, § 1, that possession of land by inclosures is not essential to enable a person to maintain the action. See *Woods* v. *Banks*, 14 N. H. 101; *Sawyer* v. *Newland*, 9 Vt. 383; *Tyson* v. *Shueey*, 5 Md. 540. The uninterrupted use of a wood lot which is not fenced, for the purpose of fuel and rails, would be sufficient. *Mackin*

v. *Geortner*, 14 Wend. 239. The doctrine of constructive possession is, that a deed of land which is recorded shall, so far as the grantee's title is concerned, be a substitute for a substantial and permanent inclosure. *Chandler* v. *Spear*, 22 Vt. 388. When a person occupies and improves under a deed a tract of land, a portion of which is inclosed, he is deemed in possession of the whole, especially if he make a notorious claim to the whole, and if one, without color of title, enters upon any part of the tract, and cuts and sells wood therefrom, he will be a trespasser and not a disseizor. *Crowell* v. *Beebe*, 10 Vt. 33; *Kincaid* v. *Logue*, 7 Mo. 167; *Welch* v. *Louis*, 31 Ill. 446; *Gent* v. *Lynch*, 23 Md. 58. It is not necessary in such case that the claim of the owner should be by a deed which is recorded, or that it should be by a deed containing all the statute requisites to convey land. It is sufficient that the claim is in writing capable of being produced on request, or even that it be distinctly indicated upon the land by unequivocal monuments, which would not fail to attract attention. *Swift* v. *Gage*, 26 Vt. 224. If a person have a deed of a part only of a tract of land, he may maintain an action for a trespass on the part to which he has no title if he have possession of it. *Hunt* v. *Rich*, 38 Me. 195. Although if a person own two adjoining lots of land by different titles, the possession of one does not extend by construction to the other. *Morris* v. *Hayes*, 2 Jones (N. C), 93. Yet, where several detached lots of wild land in the same county are included in one mortgage, and the mortgagee enters on one lot in the name of all, he has constructive possession of all, and may maintain an action for a trespass on any one of them. *Green* v. *Pettengill*, 47 N. H. 375.

The owner of land may maintain trespass against one who has a contract of purchase without the right of possession, and he may do so, although the contract gives the vendee the right to enter if the latter commits waste. *Van Deusen* v. *Young*, 29 N. Y. 9. If the vendee does not make his payments and disavows all intent to make them, the vendor may treat him as a trespasser, the same as though his original entry had been made without color of right. *Fuller* v. *Van Geesen*, 4 Hill, 171; *Woodbury* v. *Woodbury*, 47 N. H. 11. One who has possession under a contract of sale may maintain trespass against the subsequent vendee of the owner of the land (*White* v. *Livingston*, 10 Cush. 259); and he may do so against a stranger, although he has not performed, or has forfeited the conditions of his contract. *White* v. *Guirons*, Minor, 331. So, the obligee in a bond of conveyance may maintain trespass against the obligor before he has paid the balance of the purchase-money, or received his deed. *Smith* v. *Price*, 42 Ill. 399.

Where the same land is separately conveyed to two persons, the one

who has the elder title may maintain an action for a trespass committed on the land before he took possession. *Bailey* v. *Massey*, 2 Swan, 167; *Slater* v. *Rawson*, 6 Metc. 439; *Abbott* v. *Abbott*, 51 Me. 575. A person not in actual possession of land, who has no paper title, may maintain an action for a trespass thereon, if his right to the land is marked by unmistakable *indicia*. *Brown* v. *Majors*, 7 Wend. 495; *Chandler* v. *Walker*, 21 N. H. 282. A grantee of land from the United States may maintain an action for an injury to the land after his purchase and before his possession, committed by a person wrongfully entering before the purchase. *Blevins* v. *Cole*, 1 Ala. 210; *Gale* v. *Davis*, 7 Mo. 544. One who purchases and is in possession of land which is afterward discovered to belong to the State, may maintain an action for a trespass on the land, he being liable to the State for *mesne* profits. *Cutts* v. *Spring*, 15 Mass. 135. An exclusive right to the possession and enjoyment of a church pew, or of a lot in a cemetery, is sufficient to enable the owner to maintain trespass *qu. cl. fr.* for a violation of the right. *Shaw* v. *Beveridge*, 3 Hill, 26; *Jackson* v. *Rounseville*, 5 Mete. 127; *Meagher* v. *Driscoll*, 99 Mass. 281. The purchaser of an equity of redemption has a sufficient title to sustain an action of trespass. *Runyan* v. *Mersereau*, 11 Johns. 534.

§ 6. **What title or possession not sufficient.** Trespass *qu. cl. fr.* cannot be maintained by a person who has not an exclusive possession, and no interest in the soil. *Hyatt* v. *Wood*, 4 Johns. 150. Trespass will not lie in favor of one who has a right of way across a proprietor's land against another for using the way under permission of the proprietor, as his right does not carry with it a right to the exclusive possession of the land. *Morgan* v. *Boyes*, 65 Me. 124. The proprietor may use it himself or permit others to use it as a way. Id. Use of the water in a mill pond is not proof that the party has possession of the land covered by the water. *Bartholomew* v. *Edwards*, 1 Houston, 17. The plaintiff must show that, at the time of the trespass, he had the actual possession, or the right to the possession of the premises. *Houghtaling* v. *Houghtaling*, 56 Barb. 194; *McMenamy* v. *Cohick*, 1 Mo. App. 529; *Yorgensen* v. *Yorgensen*, 6 Neb. 383. Where a person gave another the key of a house in order to put him in possession of goods therein, it was held that the latter did not have such a possession of the house as enabled him to maintain trespass *qu. cl. fr.* *Davis* v. *Wood*, 7 Mo. 162. Temporary acts will not constitute such a possession as is required to sustain trespass; such as the making of a bridge with poles across a ditch at the side of a highway, for the purpose of driving cattle into a swamp, and the ranging of cattle therein, and occasionally cutting there a few trees. *Morris* v. *Hayes*, 2 Jones,

93; *Swift* v. *Gage*, 26 Vt. 224. Or using wild land belonging to the State for wood, and making sugar, and claiming up to a certain line. *Roe* v. *Wilbur*, 57 Penn. St. 406. Where in an action of trespass it appeared that when the alleged wrong was committed, the plaintiff, who had no title to the land, was engaged in constructing a fence around it, but that one side remained open, it was held that he had not such a possession as would enable him to recover. *Allen* v. *Suseng*, 1 Cold. 204.

An action for trespass on the quarantine lands of the widow cannot be maintained by the heir. *Latham* v. *Latham*, 3 Call. (Va.) 181. So, a widow who remains in the family mansion without an assignment of dower cannot maintain an action of trespass for injuries committed beyond the inclosure, but within the boundaries of the estate. *Carey* v. *Buntain*, 4 Bibb, 217. At common law, an heir or devisee who is not in actual possession cannot maintain trespass. *Hubbard* v. *Ricart*, 3 Vt. 207. Executors and administrators who have only power to sell the real estate cannot maintain an action for a trespass committed thereon subsequent to the decease of the testator or intestate. *Lyman* v. *Webber*, 17 Vt. 489; *Abuchon* v. *Lory*, 23 Mo. 99. As a tenant at sufferance is regarded at common law as holding by wrong and having only a naked possession, he cannot maintain an action against the owner of the land for dispossessing him by force and reaping the crops. *Livingston* v. *Tanner*, 14 N. Y. 64; *Esty* v. *Baker*, 50 Me. 325; *Moore* v. *Mason*, 1 Allen, 406. Where parties have a concurrent possession without other title, neither can maintain trespass against the other. *Tappan* v. *Burnham*, 8 Allen, 65. But it is otherwise when each of two persons has the right from the owner to exercise separate and distinct privileges on the land. *Haskin* v. *Record*, 32 Vt. 575. A deed of wild land not recorded will not enable the grantee to maintain trespass against a stranger. *Estes* v. *Cook*, 22 Pick. 295. So long as land is held by adverse possession the owner cannot maintain trespass. *Ring* v. *King*, 4 Dev. & Batt. 164; *Bakersfield Cong. Soc.* v. *Baker*, 15 Vt. 119; *Gardner* v. *Gooch*, 48 Me. 487. There is an exception to this rule in the case of land sold by the United States. *Cook* v. *Foster*, 2 Gilm. 652; *Butterfield* v. *Centr. Pacific R. R. Co.*, 31 Cal. 264.

§ 7. **Entry under judicial process or order.** A person's house is inviolable so far as to protect it against a forcible entry by an officer for the purpose of serving civil process on the occupier, a guest, boarder, servant or any member of his family. But protection does not extend to a stranger who flies to the house for refuge, nor to the goods of such stranger which are conveyed to the house to shield them from the ordinary process of law. *Semayne* v. *Gresham*, 5 Co. 91;

*Hubbard* v. *Mace*, 17 Johns. 127; *Burton* v. *Wilkinson*, 18 Vt. 186; *Gordon* v. *Clifford*, 28 N. H. 402. As to what constitutes a dwelling-house within the foregoing rule, it may be observed that where a house to which there is not a common entrance is occupied in distinct parts by two families, each part is deemed a separate dwelling. *Whalley* v. *Williamson*, 7 Car. & P. 294; *Fallon* v. *Anderson*, Peake, 110; *Stedman* v. *Crane*, 11 Mete. 295. The lowering of a window fastened with pulleys, by an officer to serve civil process, is such a breaking as makes him a trespasser. *Penton* v. *Brown*, 1 Keb. 698; *Lee* v. *Gansell*, Cowp. 1; *Buckenham* v. *Francis*, 11 Moore, 40; *Curtis* v. *Hubbard*, 1 Hill, 336.

§ 8. **Wrongful acts after rightful entry.** Although a person is lawfully on land under a contract of purchase, yet if he cuts timber without license he will be a trespasser. *Jackson* v. *Moncrief*, 5 Wend. 26; *Wendell* v. *Johnson*, 8 N. H. 220. If the grantor retains possession contrary to the wish of the grantee and cuts timber, he is liable to an action for trespass. *Spencer* v. *Weatherly*, 1 Jones, 327; *Narehood* v. *Wilhelm*, 69 Penn. St. 64. But when a deed reserves the standing timber, the grantor may maintain trespass against the grantee or his assignee, for cutting and carrying it away. *Goodwin* v. *Hubbard*, 47 Me. 595. It is a rule that if one enters another's premises by authority of law and commits an unjustifiable act, he will be deemed a trespasser *ab initio*, but that if the entry be by authority of the owner, the wrong-doer can only be punished for the abuse. *Six Carpenters' Case*, 4 Co. 290; 8 id. 146; *Reed* v. *Harrison*, 2 W. Bla. 1218; *Aikenhead* v. *Blades*, 5 Taunt. 197; *Allen* v. *Crofoot*, 5 Wend. 506; *State* v. *Moore*, 12 N. H. 42; *Pallard* v. *Noaks*, 2 Ark. 45. If a person, having a license from the owner of land to enter thereon and do certain acts, remains on the land and continues the acts after the license is revoked, he will be a trespasser. *People* v. *Fields*, 1 Lans. 222; 5 Lans. 284; *Bachelder* v. *Wakefield*, 8 Cush. 243; *Dodge* v. *McClintock*, 47 N. H. 383.

§ 9. **Entry to remove personal property.** When personal property is on another's land with his permission and in pursuance of a contract, he cannot lawfully prevent the owner of the property from removing it. If, therefore, standing timber is sold and left on the land by the purchaser after being cut, or any personal property bought and left thereon, the buyer has a right to go upon the land to take it away; and if the vendor resists his doing so, he may employ all the force necessary to overcome such resistance. *Wood* v. *Manley*, 11 Ad. & E. 34; *Yale* v. *Seely*, 15 Vt. 221; *Nettleton* v. *Sikes*, 8 Mete. 34; *Sterling* v. *Warden*, 51 N. H. 217; 12 Am. Rep. 80. So, where a

building is placed on another's land with his permission, the owner of the building is entitled to enter and remove the same, and the materials of construction after the permission is withdrawn. *Arrington* v. *Larrabee*, 10 Cush. 512. A person who goes upon the sea beach of another and removes a boat cast ashore by a storm and in danger of being washed away, in order to restore the boat to its owner, is not a trespasser if the proprietor of the beach has not himself taken possession of the boat. *Proctor* v. *Adams*, 113 Mass. 376; 18 Am. Rep. 500. If one wrongfully takes personal property to his premises or to the premises of a third person with the assent of the latter, the owner of the property may enter and retake it. *Patrick* v. *Colerick*, 3 M. & W. 483; *Chapman* v. *Tumblethorp*, Cro. Eliz. 329; *Richardson* v. *Anthony*, 12 Vt. 273; *Wheeldon* v. *Lowell*, 50 Me. 499. And if A wrongfully place goods in B's building, the latter may take them back and enter A's premises for that purpose. *Rea* v. *Sheward*, 2 M. & W. 424. But if the owner of personal property place it on another's land without the consent of the latter, he cannot enter to retake it without being liable as a trespasser. *Anthony* v. *Haney*, 8 Bing. 186; *Mussey* v. *Scott*, 32 Vt. 82; *Sterling* v. *Warden*, 51 N. H. 217; 12 Am. Rep. 80. So, though the owner's goods are in the illegal possession of another, he has no right to enter the premises of the latter forcibly and retake the property with violence. *Huppert* v. *Morrison*, 27 Wis. 365; *Daniels* v. *Brown*, 34 N. H. 454.

§ 10. **Trespass by animals.** At common law the owner of domestic animals is responsible for their safe-keeping, and if they escape and go on to another's premises, unless through a defect of fences, he will be liable to an action of trespass therefor, though he did not suppose that they had any propensity to rove. *Tonawanda R. R. C.* v. *Munger*, 5 Denio, 255; 4 N. Y. 349; *McBride* v. *Lynd*, 55 Ill. 411; *Keenan* v. *Cavanaugh*, 44 Vt. 268; *Lyons* v. *Merrick*, 105 Mass. 71; *Baker* v. *Robbins*, 9 Kans. 303; *Noyes* v. *Colby*, 30 N. H. 143; *Rossell* v. *Cottom*, 31 Penn. St. 525; *Gresham* v. *Taylor*, 51 Ala. 505. Where cattle are in the charge of another to be taken care of for a consideration, such person is liable for damage done by them. *Barnum* v. *Van Dusen*, 16 Conn. 200. If cattle, while being driven along a highway, stray on to adjoining uninclosed land and are immediately pursued and brought back by the person having charge of them, he is not liable for this involuntary trespass. *Stackpole* v. *Healy*, 16 Mass. 33; *Tonawanda R. R. Co.* v. *Munger*, 5 Denio, 255; 4 N. Y. 349. When the owner of a domestic animal knows that it is vicious, he will be liable for an injury committed by it in the indulgence of its evil propensity, although done while the animal was lawfully on the highway.

*Read* v. *Edwards*, 17 C. B. (N. S.) 245; *Coggswell* v. *Baldwin*, 15 Vt. 404; *Koney* v. *Ward*, 2 Daly, 295; 36 How. 255; *Swift* v. *Applebone*, 23 Mich. 252); and it need not be shown that the animal had ever before committed a similar injury. *Worth* v. *Gilling*, L. R., 2 C. P. 1. The owner of an animal which is naturally prone to mischief will be liable for an injury committed by it, although he did not know that it had any special evil propensity (*Dolph* v. *Ferris*, 7 Watts & Serg. 367; *Angus* v. *Radin*, 2 South. 815); and if the injury resulted from the fault of the owner, he will be liable whether the animal was vicious and he knew it or not. *Lee* v. *Riley*, 18 C. B. (N. S.) 722. Where a person accompanied by his dog goes unlawfully upon another's premises and the dog, against his will, commits mischief, an action will lie therefor, although he had no knowledge of the propensity of the dog to do such injury. *Beckwith* v. *Shordike*, 4 Burr. 2092. And if a person's animal, while trespassing on another's land, communicates disease to the cattle of the latter, the owner of the animal will be liable without proof that he knew it was diseased. *Barnum* v. *Van Dusen*, 16 Conn. 200. In the case of wild beasts, the owner is held to extraordinary care and vigilance. *Leame* v. *Bray*, 3 East, 593; *Canefox* v. *Crenshaw*, 24 Mo. 199; *McManus* v. *Finan*, 4 Iowa, 283; *Scribner* v. *Kelly*, 38 Barb. 14. Vol. 1, pp. 310, 311.

At common law, where a dog worries or kills sheep, to make the owner of the dog liable, he must have known that the dog had such a propensity. *Jenkins* v. *Turner*, 1 Ld. Raym. 109; *Card* v. *Case*, 5 C. B. 622. If a person know that his dog has ever bitten any one, he will be responsible for all similar injury done by the dog afterward (*May* v. *Burdett*, 9 Q. B. 101; *Cox* v. *Burbridge*, 13 C. B. [N. S.] 430; *Smith* v. *Pelah*, 2 Str. 1264; *Sarch* v. *Blackburn*, 4 Car. & P. 297; *Brown* v. *Carpenter*, 26 Vt. 638; *Buckley* v. *Leonard*, 4 Denio, 500); and a person will be liable for injury done by a vicious dog which he does not own, if he suffers the dog to stay on his premises. *McKone* v. *Wood*, 5 Car. & P. 1. In the United States it is not lawful for a person to allow a ferocious dog to run at large on his premises for the protection of his property. *Woolf* v. *Chalker*, 31 Conn. 121; *Pierret* v. *Moller*, 3 E. D. Smith, 574.

When cattle unlawfully on the highway stray upon land adjoining thereto which is not fenced, it constitutes a trespass. If the owners of adjoining premises are not required by law to maintain a division fence, each is bound to see that his cattle does not pass on to the other's premises. *Wells* v. *Howell*, 19 Johns. 385; *Henly* v. *Neal*, 2 Humph. 551; *Sturtevant* v. *Merrill*, 33 Me. 62. Their responsibility is the same where there is an undivided division fence which both are equally

bound to repair (*Rust* v. *Low*, 6 Mass. 90); and also when, owing to the peculiar location of their lands, a division fence is impracticable. *Bissel* v. *Southworth*, 1 Root, 269. If the statute makes it the duty of land-owners to inclose their property, an action of trespass cannot be maintained for damage done by stray cattle without showing that the land was inclosed by a sufficient fence. *Barnum* v. *Van Dusen*, 16 Conn. 200; *Headen* v. *Rust*, 39 Ill. 186; *Heath* v. *Coltenback*, 5 Iowa, 490; *Jones* v. *Witherspoon*, 7 Jones, 555; *Comerford* v. *Dupuy*, 17 Cal. 308; *Gregg* v. *Gregg*, 55 Penn. St. 227. But if it appears that the owners of cattle drove them upon such premises, and in so doing were guilty of a wanton and willful want of care, trespass lies. *Powers* v. *Kindt*, 13 Kan. 74. Where adjoining owners are liable to contribute to the erection or reparation of a division fence, and one of them neglects or refuses to make his part or suffers it to get out of repair, he cannot recover for damages thereby incurred. *Deyo* v. *Stewart*, 4 Denio, 101; *Hine* v. *Munson*, 32 Conn. 219; *Crane* v. *Ellis*, 31 Iowa, 510. But although a land-owner be bound to maintain and keep in repair a division fence, yet if cattle from the adjoining land trespass upon the premises of the person who ought to have kept up the fence, it will be no defense that the fence was insufficient if the cattle were wrongfully in the place from whence they came. *Dovaston* v. *Payne*, 2 H. Bl. 527; *Corwin* v. *N. Y. & Erie R. R. Co.*, 13 N. Y. 42; *Lord* v. *Wormwood*, 29 Me. 282; *Chapin* v. *Sullivan R. R.*, 39 N. H. 53.

Although, when an animal is found trespassing, it may be turned out, yet it must be done without the infliction of unnecessary injury, otherwise the party will himself become a trespasser. *Cory* v. *Little*, 6 N. H. 213; *Humphrey* v. *Douglass*, 10 Vt. 71; Vol. 1, p. 322; *Gilson* v. *Fisk*, 8 N. H. 404; *Totten* v. *Cole*, 33 Mo. 138. At common law, a person may lawfully set a dog on cattle which are trespassing to drive them from his premises, exercising reasonable prudence. *Mitten* v. *Faudrye*, Popham, 161; *Clark* v. *Adams*, 18 Vt. 425; *Wood* v. *La Rue*, 9 Mich. 158. But if he employ a ferocious dog he will be liable if the cattle are injured. *King* v. *Rose*, 1 Freeman, 347; *Amick* v. *O'Hara*, 6 Blackf. 258. If cattle go on to the premises of a person in consequence of his not maintaining a fence which he was under an obligation to do, and he turns them into the highway and leaves them there, he will be responsible. *Carruthers* v. *Hollis*, 8 Ad. & E. 113; *Roby* v. *Reed*, 39 N. H. 461. See Vol. 1, p. 321. At common law, where cattle distrained *damage feasant* are impounded before the damages have been assessed, the party seizing them will be liable as a trespasser *ab initio;* and they cannot lawfully be detained

after the tender of sufficient amends, or be impounded after the tender of the legal charges and expenses. *Singleton* v. *Williamson*, 7 H. & N. 410; *Gulliver* v. *Cosens*, 1 C. B. 788, 795; *Keith* v. *Bradford*, 39 Vt. 34. By the same law, where the cattle of a person go on to the land of an adjoining owner, and different animals commit depredation at that time, or on other days, so that it is difficult to separate the acts of mischief, the parties are permitted, in order to avoid a multiplicity of suits, and relieve them of the necessity of proving distinct and independent causes of action, to set out the trespass with a *continuando*, and recover for all the injury proved to have been committed. This rule of pleading has been adopted in New York. *Richardson* v. *Northrup*, 66 Barb. 85.

The willful killing of animals which are wrongfully on another's land is a trespass, and it will be no defense that they were committing injury. *James* v. *Caldwell*, 7 Yerg. 38; *Ford* v. *Tuggart*, 4 Texas, 492; *McCoy* v. *Phillips*, 4 Rich. 463; *Cannon* v. *Horsey*, 1 Houston, 440; *Painter* v. *Baker*, 16 Ill. 103; *Johnson* v. *Patterson*, 14 Conn. 1; *Mardree* v. *Sutton*, 2 Jones, 146; *Mathews* v. *Fiestel*, 2 E. D. Smith, 90; *Bost* v. *Mingues*, 64 N. C. 44; *Clark* v. *Keliher*, 107 Mass. 406; *Uhlein* v. *Cromack*, 109 id. 273; *Brent* v. *Kimball*, 60 Ill. 211; 14 Am. Rep. 35. Vol. 1, pp. 304, 321. But a ferocious or dangerous animal may lawfully be killed when its immediate destruction is required for the protection of mankind or to save the life of another domestic animal. *Kink* v. *Cline*, 6 Penn. St. 318; *Woolf* v. *Chalker*, 31 Conn. 121; *Dunlap* v. *Snyder*, 17 Barb. 561; *Brown* v. *Carpenter*, 26 Vt. 638; *Parrott* v. *Hartsfield*, 4 Dev. & Batt. 110; *Williams* v. *Dixon*, 65 N. C. 416. Vol. 1, p. 320.

## ARTICLE V.

### WHO MAY MAINTAIN THE ACTION.

**Section 1. In general.** The owner of land may maintain trespass, unless there is a claim of right by a person in possession to the exclusion of the owner. *Griffin* v. *Creppin*, 60 Me. 270; *Richardson* v. *Palmer*, 38 N. H. 212; *Ridgely* v. *Bond*, 17 Md. 14; *Chesley* v. *Brockway*, 34 Vt. 550; *Shipman* v. *Baxter*, 21 Ala. 456; *Vance* v. *Beatty*, 4 Rich. 104. Mere possession is sufficient when neither party has any title. *Sweetland* v. *Stetson*, 115 Mass. 49. Although possession of the land need not have been exclusive (*Bedden* v. *Clark*, 76 Ill. 338; *McCormick* v. *Huse*, 66 id. 315), yet an action for a permanent injury to the freehold cannot be maintained by one who has a mere

tortious occupancy. *Townsend* v. *Bissell*, 5 N. Y. (T. & C.) 583; 3 Hun, 556. Where neither party has actual possession, he who has the better title may maintain the action, the constructive possession being in him. *Chandler* v. *Walker*, 21 N. H. 282; *Padgett* v. *Baker*, 1 Tenn. Ch. 222. As the owner of land through which a highway is laid out retains his right to the soil of the highway, subject to the public easement, he may maintain trespass for an interference with such right. *Robbins* v. *Borman*, 1 Pick. 122. If he sell the land "saving and excepting the highway," the fee of the land used for the highway vests in the grantee, and the latter can maintain trespass against a third person for the continuance of an obstruction placed by him on a part of the highway not used for travel previous to the grant. *Peck* v. *Smith*, 1 Conn. 103; *Leavitt* v. *Towle*, 8 N. H. 96. Where land is taken by a railroad company without the consent of the owner or the payment of compensation, an action of trespass therefor must be brought by the person who owned the land at the time it was taken, and not by a subsequent purchaser. *Centr. R. R. Co.* v. *Hetfield*, 5 Dutcher, 206.

When there is an exception from a grant of land, for a specific purpose, the grantor cannot lawfully use the place reserved for any other object. Until the grantor exercises his right the exception is inoperative, and the whole premises vest in the grantee, who may maintain trespass against a third person or against the grantor, if the latter attempts to use the land in a way not embraced in the exception. *Dygert* v. *Mathews*, 11 Wend. 35. So, when a person goes on to land by permission of the owner for the enjoyment of a specific privilege granted him by the latter, he is to be regarded as in possession only for that object, and if he goes beyond it he will make himself liable. *Haskin* v. *Record*, 32 Vt. 575. One who has an entire and exclusive but temporary interest may maintain an action of trespass *qu. cl. fr.* *Dorsey* v. *Eagle*, 7 Gill & Johns. 321. When a person legally entitled to land has entered, he need not make a formal declaration of his entry, to enable him to maintain trespass against one wrongfully in possession at the time of entry, and continuing such possession afterward. *Butcher* v. *Butcher*, 7 B. & C. 399.

As a sale of standing timber is a sale of an interest in real estate, a subsequent vendee of land, with notice of the sale of the timber, cannot maintain trespass against such purchaser for cutting and removing it. But it would be otherwise in the case of a *bona fide* purchaser of the land without notice of the previous sale of the timber. *Russell* v. *Myers*, 32 Mich. 522. If a right of way does not carry with it a right to the exclusive possession of the land, one who has such a right

cannot maintain trespass *qu. cl. fr.* against a person who uses the way by permission of the owner of the land. *Morgan* v. *Boyes*, 65 Me. 124.

At common law, an action of trespass for an injury to the wife's land during coverture may be brought by the husband alone, or the wife may be joined. *Fairchild* v. *Chastelleux*, 1 Penn. St. 176. If the husband die, the suit may be prosecuted in the name of the wife alone, and in case of her death, the husband may maintain trespass for an injury done to her land during coverture. *Adams* v. *Barry*, 10 Gray, 361; *Little* v. *Downing*, 37 N. H. 355. Where a statute provides that in all matters pertaining to the wife's separate property, she may sue or be sued in her own name as though sole, her husband cannot be joined with her in an action of trespass, for an entry on her land. *Spencer* v. *St. Paul & Sioux City R. R. Co.*, 22 Minn. 29. But it would be otherwise if the alleged injury were permanent, affecting the husband's interest as tenant by the curtesy. *Chidden* v. *Coleman*, 47 N. H. 297. The wife may sue alone for a trespass on her land, notwithstanding the husband cultivates the land. *Boos* v. *Gomber*, 24 Wis. 499. When a conveyance of land is made to husband and wife, an action of trespass for cutting down and taking away timber may be brought by the husband alone. *Fairchild* v. *Chastelleux*, 1 Penn. St. 176. The fact that the husband has built a house on land of which his wife owns the fee, and that she resides there with him, is not inconsistent with his having such a possession of the house as entitles him to maintain an action against a trespasser for forcibly entering it. *Alexander* v. *Hard*, 64 N. Y. 228; 42 How. 384.

In general, an action of trespass cannot be maintained by a landlord against a third person for an entry upon the premises while in possession of the tenant. *Harrison* v. *Blackburn*, 17 J. Scott (N. S.), 678; *Torrence* v. *Irwin*, 2 Yeates, 210; *Holmes* v. *Seely*, 19 Wend. 507; *Tilghman* v. *Cruson*, 4 Harring. 341; *Wentworth* v. *Portsmouth & Dover R. R.*, 55 N. H. 540. This rule is applicable to a tenant at will, unless the injury is of a permanent character, in which case there is an exception. *Smith* v. *Fortiscue*, 3 Jones, 65; *Woodman* v. *Francis*, 14 Allen, 198; *Davis* v. *Nash*, 32 Me. 411. But see *Clark* v. *Smith*, 25 Penn. St. 137. Where a tenant at will mortgages the land to a third person, the landlord may maintain an action of trespass against the mortgagee, although the latter has obtained judgment against the mortgagor, and has been put in possession. *Little* v. *Palister*, 4 Me. 209. If the injury be to the inheritance as well as to the possessory interest of the tenant, separate actions may be brought by both landlord and tenant. But the remedy of the landlord is an action on the case. *Bedingfield*

v. *Onslow*, 3 Lev. 209; *Randall* v. *Cleaveland*, 6 Conn. 328; *Cushing* v. *Kenfield*, 5 Allen, 307; *Wood* v. *Griffin*, 46 N. H. 230; *Wood* v. *City of Williamsburgh*, 46 Barb. 601. If a lease reserve the trees, the landlord being in possession of the soil on which they grow, may enter, cut and carry them away; and if it be done by any other person, trespass therefor may be maintained by the landlord. *Glenham* v. *Hanby*, 1 Ld. Raym. 739. When trees growing on land occupied by a tenant are severed from the soil, as the tenant has no longer any interest in, or right to them, an action of trespass for carrying them away must be brought by the landlord. Although where the tenant of a farm has exclusive occupancy, the landlord cannot maintain trespass for a wrongful entry (*N. J. & C. R. R. Co.* v. *Vansyckle*, 37 N. J. 496); yet, if the rent is to be paid in a share of the crops, an action for an injury to the crops while growing may be brought by the landlord separately, or jointly with the tenant. *Stewart* v. *Doughty*, 9 Johns. 108; *Moulton* v. *Robinson*, 27 N. H. 550; *Harris* v. *Frink*, 49 N. Y. (4 Sick.) 24, 27; 10 Am. Rep. 318. See *Reeder* v. *Sayre*, 70 N. Y. (25 Sick.) 180. When they own the crops in common, or the crops are to be used on the land, the action must be brought by them jointly. *Cutting* v. *Cox*, 19 Vt. 517; *Fiero* v. *Betts*, 2 Barb. 633; *Hatch* v. *Hart*, 40 N. H. 93.

An action of trespass may be maintained by a former against a subsequent tenant of a farm, for willfully allowing his hogs to destroy the grain of the former, while growing and being harvested. *Morrison* v. *Mitchell*, 4 Houston, 324. When grass growing on leasehold premises is cut and carried away by a stranger, the tenant can alone maintain an action therefor. *Lyford* v. *Toothaker*, 39 Me. 28. But a person not in possession of land which he cultivates on shares cannot maintain trespass either alone or jointly with the owner, for an injury to the crop. *Hare* v. *Celey*, Cro. Eliz. 143; *Greber* v. *Kleckner*, 2 Penn. St. 289. A tenant in possession of land may maintain trespass against a stranger for an injury to the inheritance by cutting down trees, after satisfying the landlord for the injury. *Hayward* v. *Sedgley*, 14 Me. 439; *Wood* v. *Griffin*, 46 N. H. 230.

An action of trespass may be brought by a corporation for an invasion of its rights in real estate. *Tilden* v. *Metcalf*, 2 Day, 259; *Castleton* v. *Langdon*, 19 Vt. 210; *Second Cong. Soc.* v *Waring*, 24 Pick. 304; *Roche* v. *Milwaukee Gas Co.*, 5 Wis. 55; *Ellicottville Plank R. R. Co.* v. *Buffalo R. R. Co.*, 20 Barb. 644; *Cox* v. *Walker*, 26 Me. 504; *Greenville, etc., R. R. Co.* v. *Partlow*, 14 Rich. 237. Where land is held in trust, the trustee may maintain trespass (*Carrine* v. *Westerfield*, 3 A. K. Marsh. 331); but if the *cestui que trust* has actual possession,

the action should be brought by him. *Cox* v. *Walker*, 26 Me. 504; *Rogers* v. *White*, 1 Sneed, 68. When executors have power to manage, as well as to sell the real estate, and to retain a certain portion of the avails until the children of the testator severally reach the age of twenty-one years, they may maintain an action of trespass for an unlawful entry upon the land. *Dascomb* v. *Davis*, 5 Metc. 335. When an heir or devisee has entered and taken actual possession, he may maintain trespass, although the injury was committed previous to his entry, but after the death of the ancestor or testator. *Barnett* v. *Earl of Guilford*, 11 Exch. 19.

§ 2. **Joinder of plaintiff.** At common law, tenants in common must join in an action of trespass for an injury to the realty. *May* v. *Slade*, 24 Texas, 205; *Hobbs* v. *Hatch*, 48 Me. 55; *De Puy* v. *Strobg*, 37 N. Y. 372. In some of the States they are allowed to join or sever in the action. *Hobbs* v. *Hatch*, 48 Me. 55; *Webber* v. *Merrill*, 34 N. H. 202; *Hubbard* v. *Foster*, 24 Vt. 542; *McGill* v. *Ash*, 7 Penn. St. 397. Where two persons take lands separately, and afterward agree, by an instrument under seal, that the lands were purchased jointly, "for promoting the joint interests of the parties, by securing to them the timber on said lands, to be sawed into plank," the writing will be regarded as a covenant on the part of each to stand seized to the use of the other of an undivided interest in the trees growing on the lands, and will enable the parties to maintain a joint action of trespass for an injury to the trees. *Blackburn* v. *Baker*, 1 Ala. 173. The executors of a deceased tenant in common may be joined as plaintiffs with the surviving tenant. In an action for an unlawful erection on the land of two tenants in common, which is continued after the death of one of them, the devisee of the deceased tenant in common should join the survivor. *Patton* v. *Crow*, 26 Ala. 426. Where two persons are partners in mining, they may join in an action of trespass for an injury to the mine, although one of them has a lease of the premises, and owns all the stock, fixtures, capital and property. *Douty* v. *Bird*, 60 Penn. St. 48.

## ARTICLE VI.

### WHO MAY BE SUED.

**Section 1. In general.** Any person who willfully violates another's right to the undisturbed enjoyment of real estate, of which the latter is in possession, may be sued in trespass. Some of the numerous acts which will subject the wrong-doer to this form of action have already been mentioned, *ante*, p. 90, art. 4, § 2. An action of trespass may be

maintained against a corporation for the tortious acts of its agents or officers, in relation to the property or real estate of another. *Maund* v. *Monn. Canal Co.*, 4 M. & Gr. 452; *Green* v. *Lond. Omnibus Co.*, 7 C. B. (N. S.) 290; *Dater* v. *Troy Turnpike & R. R. Co.*, 2 Hill, 629; *Allen* v. *Decatur*, 23 Ill. 332; *Peck* v. *Ellsworth*, 36 Me. 393; *Hildreth* v. *City of Lowell*, 11 Gray, 345. Where private property is intruded upon, there is no presumption that the act was done by lawful authority, because committed or directed by a municipal corporation having general power in relation to similar acts. *Bradt* v. *City of Albany*, 5 Hun, 591. A municipal corporation is liable in trespass for an injury caused to the house of a person, by the cutting of a sewer, the necessary consequence of which is, to collect and throw large quantities of water upon such person's premises, which otherwise would not have flowed upon them. *Ashley* v. *City of Port Huron*, 35 Mich. 296; 24 Am. Rep. 552. Village authorities caused a plank sidewalk to be laid down at the expense of the village in front of the plaintiff's lot, on a grade prepared by the plaintiff. The walk was suffered to remain, and to be used two years, during which time the plaintiff kept it in repair; but it was finally removed by the corporation to another part of the village. Held, that the village had no more right to remove the walk without the plaintiff's consent, than it would have had if it had been a building; that the walk upon being laid down became appurtenant to the lot, and the plaintiff was invested with a property right therein; and that its removal by the corporation was a trespass. *Rogers* v. *Randall*, 29 Mich. 41.

Where A claims to own lands which belong to B, and he sells timber on such lands to C, who cuts and removes it, an action of trespass lies by B against A as a principal trespasser. *Dreyer* v. *Ming*, 23 Mo. 434.

§ 2. **Joint trespass.** It has been seen (*ante*, p. 53, art. 3, § 2), that when several act in concert in committing the injury, they may be sued either jointly or severally, and that each is deemed guilty of the whole, though there can be but one satisfaction.

§ 3. **Landlord or tenant.** As a rule, trespass cannot be maintained by a landlord against his tenant for an injury to the freehold by the latter. *Alexander* v. *Bonnin*, 4 Bing. N. C. 799; *Chadbourne* v. *Straw*, 22 Me. 450. But it is otherwise in the case of a tenancy at will, which would be terminated upon the commission of the wrong. *Daniels* v. *Pond*, 21 Pick. 367; *Ripley* v. *Yale*, 16 Vt. 257. When a farm is let to be cultivated on shares, the landlord cannot maintain trespass against the tenant for taking away the crops previous to division. *Briggs* v. *Thompson*, 9 Penn. St. 338. Where it is agreed that the crops shall

belong to the landlord, and the tenant, notwithstanding, sells them, the landlord may recover in trespass against all engaged in the transaction. *Gray* v. *Stevens*, 28 Vt. 1; *Lewis* v. *Lyman*, 22 Pick. 437. So, when the trees are reserved by the lease, the landlord may maintain trespass against the tenant if he cut them (*Glenham* v. *Hanby*, 1 Ld. Raym. 739); and if the tenant hold over, the landlord may treat him as a trespasser. *Hemphill* v. *Flynn*, 2 Penn. St. 144; *Williams* v. *Caston*, 1 Strobh. 130. If a tenant, after fraudulently altering the lease in a material part, prevents the landlord from exercising acts of ownership upon the premises, the latter may maintain trespass against the tenant therefor. *Bliss* v. *McIntyre*, 18 Vt. 466.

When a landlord wrongfully enters on premises occupied by his tenant, or removes crops which are cultivated on shares, the latter may maintain trespass against him. *Wilber* v. *Paine*, 1 Ohio, 251; *Caldwell* v. *Julian*, 2 S. C. Rep. Con. Ct. 294; *Blake* v. *Coats*, 3 Iowa, 548; *Lathrop* v. *Rogers*, 1 Cart. (Ind.) 554; *Symonds* v. *Hall*, 37 Me. 354; *Hatchell* v. *Kimbrough*, 4 Jones (N. C.), 163. If a landlord, in making a distress, uses unlawful force, or after making a lawful distress, abuses the distress, he is liable in trespass for all the damage sustained by the tenant thereby. *Oxley* v. *Watts*, 1 Term R. 12; *Attack* v. *Bramwell*, 3 B. & S. 520; 32 L. J., Q. B., 146. Although upon the termination of a tenancy the owner of the land, after allowing the lessee a reasonable time to take away his family, and property, may enter peaceably upon the premies and remove therefrom the lessee, and his goods, using no more force than is required for that purpose (*Turner* v. *Meymott*, 1 Bing. 158; *Harvey* v. *Brydges*, 14 M. & W. 437; *Clark* v. *Kleither*, 107 Mass. 406; *Stearns* v. *Sampson*, 59 Me. 568; 8 Am. Rep. 442; *contra: Flaherty* v. *Andrews*, 2 E. D. Smith, 529); yet, if the landlord, subsequent to the forfeiture of the lease, receives rent, and afterward forcibly interferes with the possession of the tenant, he will be liable as a trespasser. *Jolly* v. *Single*, 16 Wis. 280.

§ 4. **A mortgagor or mortgagee.** A mortgagee may maintain an action of trespass against the mortgagor, for removing a building or fixtures from the mortgaged premises, cutting down and carrying away trees, or committing any other act which diminishes the value of the security. *Smith* v. *Goodwin*, 2 Me. 175; *Smith* v. *Moore*, 11 N. H. 55; *Hapgood* v. *Blood*, 11 Gray, 400; *Jones* v. *Costigan*, 12 Wis. 677. The liability of the mortgagor in such case will not be changed by the fact that the building removed was erected on the land subsequent to the giving of the mortgage. *Cole* v. *Stewart*, 11 Cush. 181; *Preston* v. *Briggs*, 16 Vt. 124. When the mortgagor is in possession of the mortgaged premises, under a contract with the mortgagee, the relation

of landlord and tenant exists between them, and the former may maintain trespass *qu. cl. fr.* against the latter. *Marden* v. *Jordan*, 65 Me. 9.

§ 5. **Joint tenants or tenants in common.** Although, as a rule, a tenant in common cannot maintain trespass *qu. cl. fr.* against his co-tenant (*Martyn* v. *Knowllys*, 8 Term. R. 145; *Owen* v. *Foster*, 13 Vt. 263; *Silloway* v. *Brown*, 12 Allen, 30; *Booth* v. *Sherwood*, 12 Minn. 426); yet he may do so, when he occupies a distinct part of the common property by agreement with his co-tenant (*O'Hear* v. *De Goesbriand*, 33 Vt. 593); or where his co-tenant expels him from the premises, or prevents his entry (*Murray* v. *Hall*, 7 C. B. 441; *Stedman* v. *Smith*, 8 El. & Bl. 1; *Midford* v. *Hardison*, 3 Murphy, 164; *Thomas* v. *Pickering*, 13 Me. 353; *Great Falls Co.* v. *Worster*, 15 N. H. 412; *McGill* v. *Ash*, 7 Penn. St. 397; *Bennett* v. *Clemence*, 6 Allen, 18; *Dubois* v. *Beaver*, 25 N. Y. 123); though there be no exhibition of force, but merely a denial of right, with conduct showing a determination to resort to force, if necessary (*Jefcoat* v. *Knotts*, 13 Rich. 50; *Carpenter* v. *Gardiner*, 29 Cal. 160); or when his co-tenant practically destroys the subject of the tenancy. *Cubitt* v. *Porter*, 8 B. & C. 257; *Critchfield* v. *Humbert*, 39 Penn. St. 427; *Benedict* v. *Howard*, 31 Barb. 569; *Symonds* v. *Harris*, 51 Me. 14. Trespass will lie by a preceding tenant against the succeeding tenant of a farm for willfully allowing his hogs on the farm to continually trespass on and damage the wheat of the former while growing and being harvested upon it. *Morrison* v. *Mitchell*, 4 Houst. 324. Tenants in possession may be sued jointly for a trespass committed by animals, kept by them in common, upon the premises, although the several animals are owned by them separately and individually. *Jack* v. *Hudnall*, 25 Ohio St. 255; 18 Am. Rep. 298.

§ 6. **Damages.** The person entitled to damages is the one who owned and was in possession of the land when the injury was committed, and not a subsequent purchaser. *Furbush* v. *Goodwin*, 25 N. H. 425. Although in every case of unlawful intrusion upon the premises of another, the individual intruded upon may maintain an action therefor, yet, as a general rule, unless he is able to show some actual injury, he can only be allowed nominal damages. *Caruth* v. *Allen*, 2 McCord, 226; *Norvell* v. *Thompson*, 2 Hill (S. C.), 470; *Parker* v. *Griswold*, 17 Conn. 288; *Jones* v. *Gooday*, 8 M. & W. 146; *Shannon* v. *Burr*, 1 Hilton, 39; *Jewett* v. *Whitney*, 43 Me. 242. If there is no evidence of injury to the soil, or to any of its products, or to the buildings, the fact that the defendant's conduct was fraudulent would not be a ground of damage. *Spear* v. *Hubbard*, 4 Pick. 143. As, however, the plaintiff

has a right to indemnity for all he has actually suffered, it is proper for the jury, in estimating the damages, to take into consideration the nature of the entry: whether it was violent, or the reverse; malicious, or by mistake; under color of right, or without any pretense of title. *Bateman* v. *Goodyear*, 12 Conn. 575; *Freidenheit* v. *Edmundson*, 36 Mo. 226. When damages are claimed for searching a house without a warrant, circumstances of reasonable suspicion that evidences of crime were concealed there, may be shown in mitigation of damages. *Simpson* v. *McCaffrey*, 13 Ohio, 508. Where in an action of trespass for breaking and entering the plaintiff's close, and carrying away certain personal property, it is shown in defense that the defendant entered as landlord, to distrain for rent in arrear, the plaintiff cannot be allowed consequential damages for injury to his business. *Kirby* v. *Douglas*, 75 Ill. 443.

In case of disseisin, the plaintiff, before re-entry, is only entitled to damages for the first entry. *Rowland* v. *Rowland*, 8 Ohio, 40; *Cutting* v. *Cox*, 19 Vt. 517; *Abbott* v. *Abbott*, 51 Me. 575. But after he has re-entered, he may recover the intermediate damages or mesne profits, and, also, for any permanent injury to the freehold. *Woods* v. *Banks*, 14 N. H. 101. The doctrine that in trespass *qu. cl. fr.* the plaintiff can recover only for the first entry, and not for the use of the premises until he re-enters, is not, however, applicable to the invasion of a constructive possession; though the subsequent abandonment of the premises would constitute a constructive re-entry by the holder of the legal title. *McWilliams* v. *Morgan*, 75 Ill. 473. In an action by a tenant against a stranger, the tenant is not entitled to damages for an injury to the inheritance, unless there has been a recovery against him by the landlord, or satisfaction made in some form. *Wood* v. *Griffin*, 46 N. H. 230.

If a building be torn down by the trespasser, the measure of damages will be the cost of restoring it to the condition it was in previous to the commission of the wrong. *Duke of Newcastle* v. *Hundred of Broxtowe*, 4 B. & Ad. 273. But where the soil is carried away, the criterion of damages is its value to the plaintiff. *Jones* v. *Gooday*, 8 M. & W. 146; *Attersoll* v. *Stevens*, 1 Taunt. 183; *Mueller* v. *St. Louis, etc., R. R. Co.*, 31 Mo. 262; *Maye* v. *Yappen*, 23 Cal. 306; *Karst* v. *St. Paul, etc., R. R. Co.*, 22 Minn. 118. But see *U. S.* v. *McGoon*, 3 McLean, 171. In the case of timber cut and removed from the land, the plaintiff is entitled to recover for the injury to the land, as well as for the value of the timber. *Longfellow* v. *Quimby*, 33 Me. 457; *Bennett* v. *Thompson*, 13 Ired. 146; *Achey* v. *Hull*, 7 Mich. 423. But not the enhanced value of the timber from labor bestowed upon

it by the defendant. *Foote* v. *Merrill*, 54 N. H. 490; 20 Am. Rep. 151. But in an action to recover damages for wrongfully cutting and carrying away logs from the plaintiff's land, he is entitled to recover the value of the logs as they lay upon the land and is not restricted to the value of the trees as they stood. *Firmin* v. *Firmin*, 9 Hun, 571. In trespass for breaking into the plaintiff's rooms and destroying his property, counsel fees and other expenses of the litigation cannot be included in the damages. *Falk* v. *Waterman*, 49 Cal. 225.

The measure of damages for a continuing trespass on real estate is the loss sustained at the time of bringing the action for which a recovery has not been had; and not the diminution in the value of the property. *Cumberland & Oxford Canal* v. *Hitchings*, 65 Me. 140. When a sub-tenant holds over, the lessor may recover, in an action against the tenant, the value of the premises for the time he is kept out, together with the cost of ejecting the under tenant. *Bramley* v. *Chesterton*, 2 C. B. (N. S.) 605; *Henderson* v. *Squire*, L. R., 4 Q. B. 170. In case of the obstruction of a street or highway, the damage done to the adjoining property may be recovered, although the property is not touched by the obstruction. *Little Miami R. R. Co.* v. *Naylor*, 2 Ohio St. 235; *contra: McLaughlin* v. *R. R .Co.*, 5 Rich. 583. In an action for obstructing a right of way, the plaintiff is entitled to more than nominal damages. *Smiles* v. *Hastings*, 24 Barb. 44. The owner of land taken for a railroad is entitled to damages, although he stood by, and permitted the company to lay their track on his land. *McAuley* v. *Western Vt. R. R. Co.*, 33 Vt. 311; *Western Penns. R. R. Co.* v. *Johnston*, 59 Penn. St. 290. And he is not confined to nominal damages, although an estimate of the damage was not proved at the trial. *Spencer* v. *St. Paul & Sioux City R. R. Co.*, 22 Minn. 29.

When animals belonging to different persons commit mischief together, and it is impossible to show the exact injury, done by each, the jury have the right to find that the larger and more powerful animal did the most damage. *Wilbur* v. *Hubbard*, 35 Barb. 303. If the owner of an animal, wrongfully killed, takes possession of it, the measure of damages is, what it was worth when alive, and not the value of the dead animal, unless the owner derives an actual benefit from it. *Champion* v. *Vincent*, 20 Tex. 811; *Indianapolis, etc., R. R. Co.* v. *Mustard*, 34 Ind. 50. When the owner of cattle wrongfully impounded pays the pound-keeper his fees in order to get the cattle back, he does not thereby waive his right to damages. *Coffin* v. *Field*, 7 Cush. 355.

When the conduct of the trespasser was wanton, willful, or malicious, or rude and insulting, exemplary damages may be given. *Williams* v. *Currie*, 1 C. B. 847; *Merest* v. *Harvey*, 5 Taunt. 443; *Goodwin* v.

*Chevely*, 4 H. & N. 631; *Perkins* v. *Towle*, 43 N. H. 220; *Greenville, etc., R. R.* v. *Partlow*, 14 Rich. 237; *Devaughn* v. *Heath*, 37 Ala. 595; *Douty* v. *Bird*, 60 Penn. St. 48; *Stillwell* v. *Barnett*, 60 Ill. 210. But see *Armstrong* v. *Iowa Falls & Sioux City R. R. Co.*, 34 Iowa, 502. Six hundred dollars damages were not held excessive in an action by a tenant against a landlord, for tearing down and removing the tenant's house, though done partly under the advice of counsel. *Jasper* v. *Purnell*, 67 Ill. 358. The court took the same view, where the jury found five hundred dollars damages, in an action of trespass *qu. cl. fr.* against a person who attempted to take the law into his own hands in order to deprive the plaintiff of his rightful possession. *Bauer* v. *Gottmanhausen*, 65 Ill. 499.

§ 7. **Double and treble damages.** In some of the States, the plaintiff is entitled in certain cases of trespass specified by statute, to a judgment for double or treble the amount of damages assessed by the verdict. Such statutes being penal, are to be strictly construed and carefully followed. Although the acts complained of must have been forcible, unlawful, and unauthorized, yet they need not have been preceded by an unlawful entry. *Van Dusen* v. *Young*, 29 N. Y. 9. The facts on which it is to be determined, whether the defendant is liable to such damages, are of course to be found by the jury. In Missouri, where in an action for the wrongful entry on land, and cutting and carrying away timber, there was a general verdict for the plaintiff and an entire assessment of damages, but no finding of the value of the timber, it was held that the damages could not be trebled under the statute. *Ewing* v. *Leaton*, 17 Mo. 465; *Labeaume* v. *Woolfolk*, 18 id. 514. See *Newcomb* v. *Butterfield*, 8 Johns. 342; *King* v. *Havens*, 25 Wend. 420; *Dubois* v. *Beaver*, 25 N. Y. 123; *Tewksbury* v. *O'Connell*, 25 Cal. 262.

§ 8. **Judgment.** A recovery by the plaintiff is conclusive in another action between the same parties of the plaintiff's possession at that time, and that a trespass was then committed; and it will be presumed that he still has possession, until the contrary is proved. *Stean* v. *Anderson*, 4 Harring. 209. When the trespass consists of several acts constituting but one cause of action, and there is a single count in the declaration, alleging all of them, a judgment for some of the acts will bar a subsequent action for the others (*Goodrich* v. *Yale*, 8 Allen, 454); but not when each act is a distinct ground of action, and the subject of the second action was not embraced in the first. *White* v. *Moseley*, 8 Pick. 356. When an injury, caused by a trespass, had not accrued, and was not included in the judgment, a second action may be brought for such injury. *Hagan* v. *Casey*, 30 Wis. 553.

If but one close is set out and described, and judgment passes upon

the sole plea of *liberum tenementum*, the record is *prime facie* evidence that the party in whose favor the judgment is rendered has a title to the whole; though this presumption may be rebutted. *Dunckle* v. *Wiles*, 6 Barb. 515. See S. C., 11 N. Y. (1 Kern.) 420. Where, however, the declaration charges that the defendant committed a trespass upon the plaintiff's land, and describes it as containing a given number of acres, setting it out by abuttals, and the defendant pleads that the place where the alleged trespass was committed, is his soil and freehold, and judgment is rendered for the plaintiff, it does not determine the title to the entire close in favor of the latter, but only to part of it, and what this part was must be proved. Id. Although the only question tried is the title to the land, the judgment will not bar an action for another trespass, unless it is shown that both trespasses were committed in the same place. *Morse* v. *Marshall*, 97 Mass. 519.

When the plaintiff fails to prove the acts alleged, or his right of possession, the judgment must be for the defendant. As the right of possession only, and not the title, is involved in an action of trespass, such a judgment is not conclusive upon the title, and while it determines the right of possession at the time of the commission of the alleged wrongful act, it does not settle the right of possession at any subsequent time. *Morse* v. *Marshall*, 97 Mass. 519. But a finding upon title is a bar to the future recovery of damages for a trespass arising from the same alleged injury, and operates as an estoppel to an action for an injury to the same supposed right of possession. *Outram* v. *Morewood*, 3 East, 346.

## ARTICLE VII.

### DEFENSES.

**Section 1. In general.** The entry will be excused when it was made in good faith, and by consent of the owner of the land, in consequence of the mutual mistake of the parties in supposing that the defendant had a right to enter. *Shaw* v. *Mussey*, 48 Me. 247. So, it will be an excuse that the defendant entered from necessity, as to save life which was imperiled, or because the highway, by an unexpected occurrence, such as a sudden flood, a heavy drift of snow, or the falling of a tree, became impassable, and he was obliged, in order to reach his destination, to go across the adjacent land. *Bullard* v. *Harrison*, 4 M. & Sel. 387; *Newkirk* v. *Sabler*, 9 Barb. 652; *Campbell* v. *Race*, 7 Cush. 408. The right to go upon the adjacent land, when the highway is obstructed, cannot lawfully be exercised for purposes of mere convenience, but only in cases of inevitable necessity arising from sudden

and recent causes, and the right does not attach to a private way by grant. *Boyce* v. *Brown*, 7 Barb. 80, 89; *Taylor* v. *Whitehead*, 2 Doug. 745. But, if a private way is obstructed by the owner of land which is subject to such private way, the person entitled to the use of the way may lawfully enter upon and go over the adjoining land of such owner. *Leonard* v. *Leonard*, 2 Allen, 543; *Kent* v. *Judkins*, 53 Me. 160; *Henn's Case*, W. Jones, 296. If, however, a person have permission to pass over land, with a wagon, he may go on the adjoining land to turn round, if he cannot otherwise turn. *Williams* v. *James*, L. R., 2 C. P. 577. As the grantee of a right of way over another's land is bound to keep the way in repair, he may lawfully go upon the land for that purpose (*Pomfret* v. *Ricroft*, 1 Wms. Saund. 321; *McSwiney* v. *Haynes*, 4 Ir. Eq. 322); and if the grantor wilfully interrupt the way, the grantee will be justified in restoring it, although unavoidable damage be done to the grantor thereby. *Hamilton* v. *White*, 5 N. Y. 9.

If the defendant seeks to justify the breaking and entering a house without warrant, on suspicion of felony, he must show not only that he had reason to believe that the suspected person was there, but that he entered for the purpose of arresting such person. *Smith* v. *Shirley*, 3 C. B. 142; 15 L. J. (N. S.) 230.

In trespass for breaking or entering a dwelling-house, or for injuring it, it is no defense that the plaintiff kept a bawdy house (*Low* v. *Moynehan*, 16 Ill. 277); or that it was occupied by a family of lewd females. *Perkins* v. *Towle*, 43 N. H. 220. And evidence of such facts is not admissible in mitigation of damages. Id.; *Weston* v. *Gravlin*, 49 Vt. 507.

Proof of a judgment pleaded by way of estoppel, but covering only another part of the premises, will not constitute a defense. *Providence* v. *Adams*, 10 R. I. 184. Where in an action of trespass against an heir, he justifies as a tenant in common of the premises with the plaintiff, and alleges that there never has been any partition of the same, the plaintiff may show in rebuttal the record of proceedings for partition, although it does not appear that the report of partition was approved, and may also show that possession was taken by the several parties in interest, of the shares assigned to each, and that the same has been acquiesced in for a number of years. *Grimes* v. *Butts*, 65 Ill. 347.

§ 2. **License.** It will be a defense that the defendant entered by license or authority of law, as to execute legal process; to distrain for rent; to see that his tenant committed no waste, or kept the covenants of the lease; or to demand money due him payable there; or to obtain accommodations or refreshment at an inn; or to transact business with

a wharfinger, or warehouseman, from whom he had received no notice not to come upon the premises. *Newkirk* v. *Sabler*, 9 Barb. 652; *Beardsley* v. *French*, 7 Conn. 125; *Heeny* v. *Heeny*, 2 Denio, 625.

To render a license available, it must be given by one having lawful authority for that purpose; and a wife cannot confer such authority as to her husband's lands or houses. *Humes* v. *Taber*, 1 R. I. 464; *Haight* v. *Badgeley*, 15 Barb. 499, 502; *Tayler* v. *Fisher*, Cro. Eliz. 246.

To constitute a license by the plaintiff, he must have given the defendant permission, either express or implied, to enter upon the premises. When the parties are on terms of intimacy, and in the habit of going on to each other's land, a general license will be implied, and an entry by one, in the customary manner, cannot be regarded as a trespass. *Lakin* v. *Ames*, 10 Cush. 198; *Martin* v. *Houghton*, 45 Barb. 258; *Ditcham* v. *Bond*, 3 Camp. 524. The same is the case where the son of the owner of standing timber sells it, by verbal permission of his father to do so and receive the avails, and the grantee of the son cuts and carries away the timber. *Coxe* v. *England*, 65 Penn. St. 212.

There may be a valid parol license for a qualified use of land, as to lay down water-pipes thereon, and at all times thereafter to enter and repair the same; to erect a building, bridge, or dam on the land; to dig a ditch across it, or to divert therefrom and use running water; to have exclusive possession of land, cultivate it and harvest the crops. *Ricker* v. *Kelly*, 1 Me. 117; *Sampson* v. *Burnside*, 13 N. H. 264; *French* v. *Owen*, 2 Wis. 250; *Floyd* v. *Ricks*, 14 Ark. 286; *Merrill* v. *Blodgett*, 34 Vt. 480. A parol license will be a justification, although it is without consideration. *Rawson* v. *Morse*, 4 Pick. 127; *Sterling* v. *Warden*, 52 N. H. 197. A license to enjoy a privilege implies the right to do whatever is essential to its exercise. *Liford's Case*, 11 Co. 52; *Pomfret* v. *Ricroft*, 1 Saund. 321; *Dand* v. *Kingscote*, 6 M. & W. 196; *Boults* v. *Mitchell*, 15 Penn. St. 371; *Newkirk* v. *Sabler*, 9 Barb. 652. An entry into a dwelling-house which is procured by fraud and falsehood, is no bar to an action of trespass. *Kimball* v. *Custer*, 73 Ill. 389.

If the licensee deviates from the license in any important particular, and the licensor thereby sustains injury, the former will be liable to an action. *Ancaster* v. *Milling*, 2 D. & R. 714. An abuse of a license given by law will make the licensee a trespasser *ab initio*. *Six Carpenters' Case*, 8 Co. 146; *Reed* v. *Harrison*, 2 W. Bla. 1218; *Aitkenhead* v. *Blades*, 5 Taunt. 197; *Ballard* v. *Noaks*, 2 Pike, 45; *Holly* v. *Brown*, 14 Conn. 255; *Sterling* v. *Warden*, 52 N. H. 197. But when the license is given by the party, the subsequent unlawful act only consti-

tutes a trespass. *Stone* v. *Knapp*, 29 Vt. 501; *Dumont* v. *Smith*, 4 Denio, 319.

A license may be revoked so far as any future enjoyment of the privilege is concerned (*Hyde* v. *Graham*, 32 L. J. Exch. 27; *Hall* v. *Chaffee*, 13 Vt. 150; *Marston* v. *Gale*, 24 N. H. 176; *Stevens* v. *Stevens*, 11 Metc. 251; *Kimball* v. *Custer*, 73 Ill. 389); notwithstanding it is found on mutual agreements, one of which is the consideration of the other. *Dodge* v. *McClintock*, 47 N. H. 383. And it may be revoked even when executed, but not without remuneration, where money has been expended. *Tayler* v. *Waters*, 7 Taunt. 373; *Liggins* v. *Inge*, 7 Bing. 682; *Wood* v. *Leadbitter*, 13 M. & W. 838; *Clement* v. *Durgin*, 5 Me. 9; *Prince* v. *Case*, 10 Conn. 375; *Munford* v. *Whitney*, 15 Wend. 380; *Houston* v. *Laffee*, 46 N. H. 505. The wife cannot revoke her husband's license in his absence, unless specially authorized by him to do so. Her authority need not, however, be expressly disclosed to the licensee; but it is sufficient that the circumstances indicate an apparent authority. *Kellogg* v. *Robinson*, 32 Conn. 335. A beneficial license, when executed under a valid contract, cannot be revoked. *Devonshire* v. *Eglin*, 14 Beav. 530; *Hodwood* v. *Edwards*, Phill. N. C. 350; *Wood* v. *Manley*, 11 Ad. & El. 34; *Smith* v. *Benson*, 1 Hill, 176; *Arrington* v. *Larrabee*, 10 Cush. 512; *Sterling* v. *Warden*, 52 N. H. 197.

A verbal license is determined by the violation of the agreement by which the license was given (*Bancroft* v. *Wardwell*, 13 Johns. 489; *Clough* v. *Hosford*, 6 N. H. 231); by the assignment of the privilege (*Hull* v. *Babcock*, 4 Johns. 418; *Gronendyke* v. *Cramer*, 2 Carter, 382); or by the death of either party (*Johnson* v. *Carter*, 16 Mass. 443; *Prince* v. *Case*, 10 Conn. 375; *Miller* v. *Auburn & Syracuse R. R. Co.*, 6 Hill, 61).

§ 3. **Legal process.** It will be a defense, that the defendant, being an officer armed with a search warrant, broke open the door of the plaintiff's dwelling-house in the day-time, and entered to execute the warrant, admittance being denied, although no goods were found there. 2 Hale's P. C. 151. The same defense will be available to the officer's assistants; but not to the prosecutor upon whose oath the warrant issued, when no stolen goods are found, unless the entry was made without using force. *Chipman* v. *Bates*, 15 Vt. 51; *Beaty* v. *Perkins*, 6 Wend. 382.

When a person after being arrested seeks refuge in a house, the officer, if necessary, may break open the outer door and retake him, after a demand of admission and refusal (*Anon.*, Lofft. 390; *Allen* v. *Martin*, 10 Wend. 300); and the same may be done where goods which have been levied upon, are shut up in a dwelling to which the officer is

denied admittance. *Glover* v. *Whittenhall*, 6 Hill, 597. If, after the officer has lawfully got inside the house, he is forcibly turned out, and the doors fastened against him, he may break in to make the arrest (*Aga Kurboolie Mahomed* v. *Reg.*, 3 Moore's P. C. 164); and if he is locked in, he may break open the door to get out. *Pugh* v. *Griffith*, 7 Ad. & E. 827. Where a person in possession of goods distrained for rent, having temporarily left, found upon his return that the tenant had locked the door against him, and broke it open in order to get in, it was held that his act was justifiable. *Bannister* v. *Hyde*, 2 Ell. & E. 627. If an officer, standing outside, touch a person in the house, for whom he has a warrant of arrest, by reaching through an open window, or a broken pane of glass, he may break into the house if necessary to secure his prisoner. *Lloyd* v. *Sandilands*, 8 Taunt. 250; *Sandon* v. *Jervis*, El. Bl. & El. 935; 28 L. J. Exch. 156. An officer, who has a warrant for the arrest of a person charged with felony, may break into the house after notice, demand and refusal of admission; and the officer will be justified, if he act in good faith, though the party sought to be arrested be not in the house. *State* v. *Smith*, 1 N. H. 346; *Barnard* v. *Bartlett*, 10 Cush. 501. An officer may break into an out-house adjoining to, and parcel of the house, to make a levy, first requesting admittance (*Penton* v. *Browne*, 1 Sid. 186; *Douglas* v. *State*, 6 Yerg. 525); and into a mill or shop, to execute an attachment, although the property he wishes to attach does not belong to the owner of the building. *Fullam* v. *Stearns*, 30 Vt. 443. Where in an action of trespass *qu. cl. fr.* against an officer, the defendant pleads in justification under a judgment, he cannot justify under the writ alone. *Clarkson* v. *Crummell*, 37 N. J. 541.

§ 4. **Title in defendant.** When the defendant justifies under a special plea of title, he must allege all the facts essential to constitute a title. *Gleason* v. *Howard*, Brayt. 190. Where it was averred in the plea, that the land in question belonged to the government, and that one of the defendants, before the alleged trespass as well as at that time, had a "claim title" to said land, upon which he had erected a house, and was then and there the owner thereof, and that as such owner, he, and the other defendants as his servants, went on to said land and removed said dwelling-house, it was held that the plea was bad, in not alleging that the defendant was in possession. *Ross* v. *Nesbitt*, 2 Gilman, 252.

The defendant need not prove title to the whole premises, but only to the part where the alleged trespass was committed. *Phillips* v. *Phillips*, 1 N. J. 42. Under a plea that the close was the close and soil of the defendant, it is sufficient for him to show that he had a

right of pre-emption in the premises, at the time of the alleged trespass. *Millison* v. *Holmes*, 1 Smith (Ind.), 55. When the declaration charges that the trespass was committed in a certain township, without describing the premises, the defendant may show title to any land in the township. *McFarlane* v. *Ray*, 14 Mich. 465; *Ellice* v. *Boyer*, 9 Wend. 503. See *Stewart* v. *Wallis*, 30 Barb. 344.

§ 5. **Title out of plaintiff.** The defendant may show that the plaintiff was not in possession at the time of the alleged trespass. *Chatham* v. *Brainerd*, 11 Conn. 60. But he cannot impugn the title of the plaintiff who is in possession by a tenant paying rent. *Wilson* v. *Hinsley*, 13 Md. 64. Where the defendant offered to prove at the trial title to the premises on which the alleged trespass was committed, out of the plaintiff under a lease executed by the grantor of the plaintiff previous to the conveyance under which the plaintiff claimed, and that they had been occupied by the lessee and his grantees, under the lease, up to the time of the trial, it was held that the evidence was admissible for the purpose of rebutting proof of constructive possession introduced by the plaintiff although the answer did not aver possession in a stranger. *Miller* v. *Decker*, 40 Barb. 228.

§ 6. **Title in a third person.** Under a plea that the close upon which the alleged trespass was committed, was not at that time the close of the plaintiff, the defendant may show a lawful right to the possession of the close in a third person under whom he claims to have acted. *Jones* v. *Chapman*, 2 Exch. 803; *Everett* v. *Smith*, Busbee (N. C.), 303. But a bare tortfeasor cannot set up in defense the title of a third person between whom and himself there is no privity of connection. *Branch* v. *Doane*, 18 Conn. 233. In justifying under a third person, the defendant must show both the title and the possession of that person (*Chambers* v. *Donaldson*, 11 East, 65; *Finch* v. *Alston*, 2 Stew. & Port. 83; *Merrill* v. *Burbank*, 23 Me. 538; *Reed* v. *Price*, 30 Md. 442); and that the acts were done by that person's authority. *Dunlap* v. *Gledden*, 31 Me. 510.

## ARTICLE VIII.

### TRESPASS TO TRY TITLE.

**Section 1. In general.** In some of the States, in place of ejectment, it is provided by statute that an action of trespass may be maintained, to try and settle titles to real estate. But the rules of construction in the action of trespass to try title are still governed by the principles of equity which are administered in ejectment. *Hough* v. *Hammond*, 36 Texas, 657. Although, at common law, trespass *qu.*

*cl. fr.* is not strictly speaking an action to try titles, for the reason that the question of title does not necessarily arise, yet such question may arise when the controversy is relative to the ownership of the premises, and it is material to show to whom the rightful possession belongs. But in the absence of any statute on the subject, the decision of an action of trespass determines nothing in respect to the title beyond the action tried. *Chandler* v. *Walker*, 21 N. H. 282.

§ 2. **Who may maintain the action.** The action may be brought by one who has possession, for an entry on his land by another. *Watson* v. *Hill*, 1 Strobh. 78; *Johnson* v. *High*, 3 id. 141; *Alexander* v. *Gilliam*, 39 Texas, 227. It will lie in behalf of a person who has an equitable title (*Martin* v. *Parker*, 26 id. 253); but not of an assignee of real estate, when the assignment is not under seal (*Ansley* v. *Nolan*, 6 Porter, 379); nor of the mortgagee against the mortgagor. *Duty* v. *Graham*, 12 Texas, 427. The action may be maintained by one of several tenants in common (*May* v. *Slade*, 24 id. 205); or by the grantee of one of several heirs (*Perry* v. *Walker*, 1 Brevard, 103); or by the widow of an intestate, to try title to the land of her deceased husband. *M'Fadden* v. *Haley*, id. 96. When the action is brought by two, and a discontinuance entered in behalf of one, a recovery may be had by the remaining plaintiff, on proof of his title. *Biencourt* v. *Parker*, 27 Texas, 558. If the plaintiff have a *prima facie* title, he may protect himself by buying in an outstanding title pending the action. *Martin* v. *Parker*, 26 Tex. 253.

§ 3. **What title plaintiff must show.** The plaintiff can only recover, by establishing his title, and it will not avail him to show a defect in the title of the defendant. *Harlock* v. *Jackson*, Const. R. 135; *Gambling* v. *Prince*, 2 Nott & McCord, 138; *Kinney* v. *Vinson*, 32 Texas, 126. Therefore, a judgment rendered, by default of the defendant, in favor of the plaintiff, without any proof or finding by the jury of title, will be erroneous. *Tally* v. *Thorn*, 35 Texas, 727. So, where the title of both parties was derived from the same person on the same day, a failure of the plaintiff to show that his title was prior in time will defeat his right to recover. *Hillman* v. *Meyer*, id. 538. Unless the defendant has obtained possession by a tortious eviction, or actual disseizin, the plaintiff must establish a perfect title. *Young* v. *Watson*, 1 M'Mullan, 449. But prior occupancy is sufficient to maintain the action against a wrong-doer without title. *Alexander* v. *Gilliam*, 39 Texas, 227. If the plaintiff claim as a purchaser at a sheriff's sale, he must prove that the judgment debtor had title. Proof of adverse possession in the latter will be sufficient; but not mere proof of the sale and conveyance by the sheriff, and that the judgment debtor

was in possession, and was reputed owner of the land at the time of the sale. *Sims* v. *Randal*, 1 Brevard, 85. The sheriff's return stating that there has been no sale, cannot be given in evidence to contradict the plaintiff's deed. *Hairston* v. *Hairston*, id. 305. The plaintiff may show, that a previous sheriff's sale of the same land was fraudulent and void, although no proceedings have been taken to set aside such sale. *Martin* v. *Ranlett*, 5 Rich. 541. But a title derived from a sheriff's deed executed after the commencement of the action, would not be sufficient, although the sale was made previous thereto. *Bank of the State* v. *South Car. Manf. Co.*, 3 Strobh. 190. When the action is against a tenant, and the landlord, by leave of court, comes in and defends, the plaintiff need not produce any other evidence than would have been required against the tenant, until the landlord shows a title out of the defendant, and in himself. *Crosby* v. *Floyd*, 2 Bailey, 116.

§ 4. **Who made defendant.** The person in possession should in general be made defendant; and it will be no defense, that he holds under a will for the benefit of others. *Conner* v. *Greenlee*, 6 Ala. 411 Where however the entry is by a tenant, the action may be brought against the landlord (*Binda* v. *Benbow*, 11 Rich. 24); if it be brought against the tenant, the landlord may obtain leave of court to be made a co-defendant with his tenant. When the landlord has had no notice of an action of trespass to try title against his tenant, he will be granted a new trial, upon application made by him within a reasonable time after judgment against the tenant. *Hough* v. *Hammond*, 36 Texas, 657. The court cannot dismiss the action as to the wrong-doer, and make a third person defendant in his stead, without the consent of the plaintiff. *Evans* v. *Hinds*, 2 Hill (S. C.), 527. An action of trespass to try title may be maintained against one of several heirs who entered on the plaintiff's half of certain land after it had been partitioned between him and the heirs. *Shannon* v. *Taylor*, 16 Texas, 413. Where the sheriff sells under execution, real estate in which the judgment debtor has no interest, he only residing on the land with the owner, a joint action of trespass to try title cannot be maintained by the purchaser and the owner against the judgment debtor. *Bauskett* v. *Holsonback*, 2 Rich. 624.

§ 5. **Defenses.** When the defendant sets up in his plea a denial of the trespass, he thereby admits the plaintiff's title (*McCarron* v. *O'Connell*, 7 Cal. 152); but a general denial puts in issue the plaintiff's right to recover. *Harlans* v. *Haynie*, 9 Texas, 459. It has been held that a plea of the general issue in an action of trespass to try title answers the whole declaration, and admits of any defense in law or equity. *Ragsdale* v. *Gohlke*, 36 Texas, 286. If the defendant does

not make any claim to the land, he may confess the trespass, disclaim title, and tender damages. But if he plead the general issue, he will have to abide by all the consequences of the action. *Watson* v. *Hill*, 1 Strobh. 78. An equitable title cannot be set up against the legal title (*Williman* v. *Robertson*, 1 Brev. [So. Car.] 201); nor a paramount title in a third person, in order to defeat a purchaser of the defendant's title at a sheriff's sale. *McElwee* v. *Beason*, 2 Rich. 26. When it appears that the defendant has no title, he cannot show in defense that the plaintiff did not pay a valuable consideration for his title. *Ann. Berta Lodge* v. *Leverton*, 42 Tex. 18. Evidence of improvements are not admissible, unless there is a suggestion of them in the pleadings. *Stephens* v. *Westwood*, 25 Ala. 716; *Rogers* v. *Bracken*, 15 Texas, 564. To enable the defendant to claim compensation for permanent improvements made in good faith, he must show that he was in possession under color of title. *Hollinger* v. *Smith*, 4 Ala. 367; *Powell* v. *Davis*, 19 Texas, 382.

Peaceable possession at the commencement of the action is a sufficient defense against a person who has not a good title. *Linthicum* v. *Marsh*, 37 Tex. 349. The defendant may show that the plaintiff does not own the land claimed. *Dalby* v. *Booth*, 16 Tex. 563. When the defendant bought the land from the plaintiff, he need only go back to the source of the plaintiff's title, but he may prove an independent title if he think proper. *Hill* v. *Robertson*, 1 Strobh. 1. If the plaintiff be a tenant in common of the defendant who has lawful possession, the latter may show that the plaintiff's title has passed from him to a third person, although the defendant does not claim under such person. *Jones* v. *Perkins*, 1 Stew. 512. The defendant may give in evidence a lease to him from the grantor of the plaintiff executed before the latter received his conveyance. *Anderson* v. *Harris*, 1 Bailey, 315.

§ 6. **Second action.** It has been held that a judgment in trespass to try title will no more bar a subsequent action for the same land, than a judgment in ejectment. *Camp* v. *Forrest*, 13 Ala. 114. In South Carolina, by the act of 1744, if the plaintiff suffer a verdict or judgment to be taken against him by default, or is nonsuited, or discontinues, he will be barred of his right and title unless he commences another action within two years. In Texas, under the statute of 1840, permitting a second action within a year, the omission of the plaintiff to indorse on the petition as required by the statute that the action was brought to try title does not deprive him of the right to another trial, unless the defendant is misled thereby. *Dangerfield* v. *Paschal*, 20 Tex. 536. The defendant cannot claim a second trial as of right, the

statute only giving such privilege to the plaintiff. *Fisk* v. *Miller*, 20 Tex. 672. Where a verdict has been rendered for the defendant and a second action is brought under the statute, another defendant being joined, it is no objection that the proceeding is in the nature of a suit in equity to annul the defendant's title and recover the property. *Allen* v. *Stephanus*, 18 Tex. 658.

§ 7. **Verdict.** The land must be described in the verdict with reasonable certainty or the judgment will be set aside. *Bennett* v. *Morris*, 9 Port. 171. A verdict that "the land belongs to the plaintiff" will support a judgment for damages and costs, and the award of a writ of possession. *Stephens* v. *Westwood*, 25 Ala. 716. A finding by the jury for a part of the plaintiff's claim is equivalent to a finding for the defendant as to the remainder, and if a second suit be brought for the same cause of action, the defendant may plead the former recovery in bar. *Dyson* v. *Leek*, 5 Strobh. 141; *Farmer* v. *Miller*, 5 Rich. 480. The sheriff should put the plaintiff in possession of such part only, leaving the defendant in possession of the remainder. *Dorn* v. *Beaseley*, 6 Rich. Eq. 408. Where therefore the verdict was in behalf of the plaintiff, "for two undivided thirds of the land in the declaration mentioned," it was held that the damages were only for detaining the two-thirds. *Hines* v. *Greenlee*, 3 Ala. 73.

§ 8. **Damages.** A verdict for the plaintiff entitles him to rent during the time the defendant is in possession, and if he be allowed nominal damages only, a new trial will be granted. *Duff* v. *Hutson*, 2 Bailey, 215. Where the defendant, while the action was pending, purchased at sheriff's sale under an execution against the plaintiff the land in controversy, it was held that the plaintiff was entitled to the damages incurred by him previous to the sale (*Stockdale* v. *Young*, 3 Strobh. 501, *note*), and such damages may be made to include mesne profits. *Biencourt* v. *Parker*, 27 Tex. 558. The plaintiff cannot rectify an error in the amount of damages by releasing them and leaving the judgment to stand for the land recovered. *Hollinger* v. *Smith*, 4 Ala. 367.

§ 9. **Judgment and its effect.** If the plaintiff establish title to any part of the land, he has a right to judgment for that part. *Scott* v. *Rhea*, 5 Tex. 258. The verdict alone constitutes the basis of the judgment and the court cannot examine the evidence in order to determine what judgment to render. *Claiborne* v. *Tanner's Heirs*, 18 Tex. 68. When the plaintiff is entitled to rent up to the time of the verdict, the judgment will be conclusive that the rent was allowed, although the tenant's term expired previous to the entry of the judgment. *Shumake* v. *Nelms*, 25 Ala. 126. A simple finding

for the defendants does not establish a title in either of the parties but leaves them in the situation they were in before they came into court, except that the defendants are entitled to costs. The following judgment was therefore held erroneous: "It is considered adjudged and decreed by the court, that the said plaintiffs take nothing by their said suit, and that the said defendants do have and recover of the said plaintiffs all costs in this behalf expended. It is further considered, ordered and decreed by the court that the titles set up by the said plaintiffs, except the patent for the land, issued by the government, do form and cast a cloud and shadow upon the title of the said defendants, and that the same are ordered to be canceled and declared to be of no validity and that the said patent be delivered up to the said defendants. And it is further ordered that the said defendants have leave to withdraw from the papers in this cause, all the deeds, titles and evidence of titles filed by them, upon leaving with the clerk and filing certified copies of the papers so withdrawn." *Johnson* v. *Newman*, 35 Tex. 166.

§ 10. **Writ of possession.** When the recovery is only for an undivided share of the land, the proper form of the writ of possession is to command the sheriff to put the plaintiff in possession of such undivided share. *Dorn* v. *Beasley*, 6 Rich. Eq. 408.

## ARTICLE IX.

### TRESPASS TO PERSONAL PROPERTY.

**Section 1. Definition and nature.** Trespass to personal property has been defined to be the taking of the property from the owner by force. *State* v. *Pearman*, Phill. (N. C.) 371. The laying hold of, removing or carrying away the goods and chattels of another is a trespass, unless the act can be justified, although the property be intermeddled with but for an instant. *Webb* v. *Paternoster*, Godb. 282; *Price* v. *Helyar*, 4 Bing. 597; *Farmer* v. *Hunt*, Brownl. 220; *Ely* v. *Ehle*, 3 N. Y. 506; *Erisman* v. *Waters*, 26 Penn. St. 467; *Parker* v. *Hall*, 55 Me. 362. The interference need not, however, have been forcible. *Phillips* v. *Hall*, 8 Wend. 610; *Miller* v. *Baker*, 1 Metc. 27. The offense may be committed by making an inventory of the property and threatening to remove it unless a receipt is given; by unlawfully purchasing goods at an execution sale; by attaching goods without removing them, or by using or wasting a thing which has been found (*Isack* v. *Clark*, 1 Roll. 126; *Oxley* v. *Watts*, 1 Term R. 12; *Attack* v. *Bramwell*, 32 L. J., Q. B. 146; *Neff* v. *Thompson*, 8 Barb. 213;

*Hardy* v. *Clendening*, 25 Ark. 436), or by refusing to surrender goods which have been placed in a person's hands for safe-keeping, or to give up property which was delivered to an individual under the erroneous belief that it belonged to him. *Hurd* v. *West*, 7 Cow. 752. But not the retention of the goods of a guest by a landlord for the non-payment of his bill. *Hartley* v. *Moxham*, 3 Q. B. 701. And the refusal of a person to redeliver goods when his authority to detain them has terminated, will not render him a trespasser *ab initio*. *Gardner* v. *Champbell*, 15 Johns. 401.

Where goods are held by a person under a contract which has been violated, his removal of them will make him a trespasser. *Holmes* v. *Doane*, 3 Gray, 328. So, a person who removes or sells goods which he holds by a license, after the revocation of the license, becomes liable to an action of trespass. *Wallace* v. *Truisdell*, 6 Pick. 455; *Ockington* v. *Richey*, 41 N. H. 275. The subsequent possession of an article by a thief, or by a person who has taken it by force, is a continuing trespass.

Although the offense may be committed without any wrongful intention, yet the taking must have been without the permission of the owner. *May* v. *Bliss*, 22 Vt. 477; *Stanley* v. *Gaylord*, 1 Cush. 536; *Wellington* v. *Drew*, 16 Me. 51; *Furlong* v. *Bartlett*, 21 Pick. 401. If goods are wrongfully taken from a trespasser, an action of trespass may be maintained by the owner against the last taker (*Barrett* v. *Warren*, 3 Hill, 348), or both wrong-doers may be joined as defendants. *Cox* v. *Hall*, 18 Vt. 191. But if the second taker came to the possession of the property by delivery and without fault on his part, he will not be liable. *Wilson* v. *Barker*, 4 Barn. & Adol. 614; *Nash* v. *Mosher*, 19 Wend. 431. If property be taken by a servant through mistake, without the authority, knowledge or subsequent assent of the master, the latter will not be liable as a trespasser, unless he failed to exercise usual and proper precautions. *Broughton* v. *Whallon*, 8 Wend. 474; *Brooks* v. *Olmstead*, 17 Penn. St. 24; *Miller* v. *Baker*, 1 Metc. 27. The law supposes that every trespass committed upon property is necessarily attended with some damage, however inconsiderable the injury, and hence the right to a recovery for a trespass cannot be denied. *Champion* v. *Vincent*, 20 Tex. 811.

§ 2. **What acts constitute a trespass.** These, with reference to chattels, most commonly consist in the wrongful removal or willful destruction or injury of the property. But a direct injury committed through negligence will usually entitle the person aggrieved to resort to this form of action, and where the negligence is gross, trespass is alone appropriate. *Hardin* v. *Kennedy*, 2 M'Cord, 277; *Johnson* v.

*Castleman*, 2 Dana, 377; *Case* v. *Mark*, 2 Ohio, 169; *Percival* v. *Hickey*, 18 Johns. 257; *Brennan* v. *Carpenter*, 1 R. I. 474; *Scott* v. *Bay*, 3 Md. 431; *Schuer* v. *Veeder*, 7 Blackf. 342; *Strohl* v. *Levan*, 39 Penn. St. 177. An injury to personal property by the direct, immediate and willful act of a person, constitutes a trespass, notwithstanding the right to use such property in a particular way is a franchise. Thus, although a privilege conferred on an individual by the legislature to errect and maintain a dam, bridge or ferry, or to navigate a particular river by steam, is a franchise, yet the means by which the incorporeal right is enjoyed, may be subjects of trespass. *Wilson* v. *Smith*, 10 Wend. 324. Where a mortgagee of personal property goes upon the premises of the mortgagor accompanied by a deputy sheriff whom he has indemnified to seize the property, but who has no legal process, such mortgagee is liable in trespass, although the mortgage was forfeited and contained an express power authorizing him to take possession. *Thornton* v. *Cochran*, 51 Ala. 415. Where the defendant castrated a mule belonging to the plaintiff which was annoying and troublesome to the defendant's stock and to the neighborhood, and which thereupon went blind; the fact that the mule was permitted to run at large is no justification for the injury done, unless the vicious habits of the mule were known to the plaintiff. *Morris* v. *Banta*, 21 Tex. 427. But where the defendant, without malice, castrated a vicious stallion of the plaintiff, which the latter suffered to run at large annoying the neighborhood, the court said it was doubtful whether the act was wrongful, but if wrongful, the plaintiff was entitled to merely nominal damages unless the castration rendered the animal less valuable. *Custard* v. *Burdett*, 15 Tex. 456.

§ 3. **What acts are not a trespass.** A person who makes a complaint to a magistrate having no jurisdiction is not liable in trespass for what is done under the warrant which the magistrate thereupon issues, although such person took no sufficient oath. *Cooper* v. *Harding*, 7 Ad. & El. (N. S.) 928 *West* v. *Smallwood*, 3 M. & W. 418; *Chivers* v. *Savage*, 5 El. & Bl. 701; *Barker* v. *Stetson*, 7 Gray, 53; *Outlaw* v. *Davis*, 27 Ill. 467. So, he will not be liable for the irregular execution of the process, unless he directed or sanctioned it (*Abbott* v. *Kimball*, 19 Vt. 551; *West* v. *Shockley*, 4 Harr. 287), and in the absence of proof, it will not be presumed that he did so. *Averill* v. *Williams*, 1 Denio, 501. He may lawfully receive and retain money paid by his debtor, which the officer tells him has been legally collected, notwithstanding the officer on account of the irregularity of the procedure is compelled to refund the money. *Hyde* v. *Cooper*, 26 Vt. 55.

Where a horse and wagon are hired to go to a certain place and no further, but are driven beyond that place, a person, who having been invited to ride, exercising no control over the wrong-doer, will not be liable, although he knew that the hirer of the team exceeded the rightful distance. *Hubbard* v. *Hunt*, 41 Vt. 376. A mere purchaser at an execution sale of property wrongfully levied on is not a trespasser if he neither take possession nor assume any dominion or control over the property. *James* v. *Martin*, 7 Vt. 92; *Talmadge* v. *Scudder*, 38 Penn. St. 517; *Conkey* v. *Amis*, 13 Ind. 260. If the buyer of goods at a void sale sell them to a *bona fide* purchaser without notice, the owner cannot maintain trespass for them, the purchaser's taking not being unlawful. *Parker* v. *Patrick*, 5 Term R. 175; *Mowrey* v. *Walsh*, 8 Cow. 238; *Justice* v. *Mendell*, 14 B. Monr. 12; *Hunter* v. *Perry*, 33 Me. 159. But as the purchaser would not acquire any title to the property, he would be liable to the owner after a demand and refusal to surrender it. *Ely* v. *Ehle*, 3 N. Y. 506. The taking of a ship on the high seas as a prize is not a trespass. *Le Caux* v. *Eden*, Dougl. 594; *Lindo* v. *Rodney*, id. 613, note 1; *Smart* v. *Wolfe*, 3 Term R. 344; *Simpson* v. *Nadeau*, Cam. & Nor. (N. C.) 115; *Dobree* v. *Napier*, 2 Bing. N. C. 782; *Stoughton* v. *Taylor*, 2 Paine (C. C.), 655. After judgment in an attachment the plaintiff cannot be made liable as a trespasser to a stranger to the proceedings. *Billings* v. *Russell*, 23 Penn. St. 189. The reversal of the judgment in an attachment suit does not make either the party or the officer a trespasser, but simply annuls the title acquired by the sale, and enables the owner of the chattel to recover it from any one into whose possession it has come. *Reinmiller* v. *Skidmore*, 7 Lans. 161.

When the owner of goods unlawfully taken and sold affirms the act, he cannot afterward treat it as a wrong nor affirm the act in part and disaffirm it in part. *Brewer* v. *Sparrow*, 7 B. & C. 310; *Lythgoe* v. *Vernon*, 5 H. & N. 180; *Fullam* v. *Stearns*, 30 Vt. 443. Although, if personal property which has been wrongfully taken remains in the custody of the wrong-doer, the assent of the owner to treat the matter as resting in contract has relation back to the time the goods were taken, and in legal effect converts it into a sale of the goods, yet when in an action of trespass the proof fails as to the wrongful taking, the plaintiff cannot waive the tort at the close of the case and recover as upon a contract. *Ransom* v. *Wetmore*, 39 Barb. 104.

§ 4. **Who may maintain the action.** One who is in possession of goods may maintain trespass against a mere wrong-doer without showing his right to them, possession alone being sufficient for the purposes of the action with respect to every one except the owner. *Harrison*

v. *Davis*, 2 Stew. 350; *Armory* v. *Delamirie*, 1 Str. 505; *Potter* v. *Washburn*, 13 Vt. 558; *Brown* v. *Ware*, 25 Me. 411; *Carson* v. *Prater*, 6 Cold. 565; *Algood* v. *Hutchins*, 3 Murphy, 496; *Boston* v. *Neat*, 12 Mo. 125; *Brush* v. *Blanchard*, 19 Ill. 31; *Scott* v. *Bryson*, 74 id. 420; *Roberts* v. *Wentworth*, 5 Cush. 192; *Limbert* v. *Fenn*, 32 Conn. 158; *Sickles* v. *Gould*, 51 How. Pr. 22. An action may be maintained by one who has possession of goods coupled with an interest, although the absolute property is in a third person. *Outcalt* v. *Durling*, 1 Dutcher, 443; *Crofoot* v. *Bennett*, 2 N. Y. 258. Where, therefore, in an action of trespass against an officer for attaching machinery and cloths of a woolen factory, it appeared that the plaintiff had loaned to the company money under an agreement with them that, as security for this loan, he should take charge of their factory and run it until he was paid, it was held that he was entitled to recover. *Howe* v. *Keeler*, 27 Conn. 538. Both the person who has the general property and he who has the special property in goods may maintain an action of trespass for taking and injuring them. But a recovery of damages by either will bar the other of his right of action. *Luse* v. *Jones*, 39 N. J. 707. One, however, who has the mere possession of goods cannot maintain the action when a third person from whom the defendant derived his title is shown to have had a special property in them. *Hammond* v. *Plimpton*, 30 Vt. 333. In case of the assignment of property for the benefit of creditors, the assignees may maintain an action for its injury (*Mitchell* v. *Hughes*, 6 Bing. 689); and it is the same where injury to the bankrupt results from injury to the goods. *Drake* v. *Beckham*, 11 M. & W. 315. When, however, the injury to the bankrupt is distinct from the injury to the goods, the bankrupt may maintain an action for the former and the assignees another action for the latter. *Rogers* v. *Spence*, 12 Cl. & Fin. 700. If the bankrupt retain possession of the property, an action for the wrongful taking of it may be brought by him. *Brewer* v. *Dew*, 11 M. & W. 625.

The owner of goods may maintain trespass for the taking of them by a stranger, although the former never had possession in fact, a general property drawing to it possession. *Ward* v. *Macauley*, 4 Term R. 489; *Bulkley* v. *Dolbeare*, 7 Conn. 232. Where a person buys goods by bill of sale, he may maintain trespass against the seller for converting them, although they were not delivered. *Edwards* v. *Edwards*, 11 Vt. 587. When personal property sold is not present at the time so as to be capable of delivery, and one without legal right takes it away before the vendee by the exercise of ordinary diligence can obtain actual possession of it, an action of trespass will lie in

behalf of the vendee for such taking. *Parsons* v. *Dickinson*, 11 Pick. 352. A person who delivers goods to another with the right to resume possession at any time, may maintain an action of trespass against one who takes them away. *Burrows* v. *Stoddard*, 3 Conn. 431; *Thomas* v. *Phillips*, 7 Car. & P. 573; *Gauche* v. *Mayer*, 27 Ill. 134; *Williams* v. *Lewis*, 3 Day, 498; *Staples* v. *Smith*, 48 Me. 470. Where, however, lumber is left by a tenant upon the demised premises at the expiration of the term, he cannot maintain trespass against a subsequent purchaser in possession for taking the lumber away. *Weitzell* v. *Marr*, 46 Penn. St. 463.

When the property of a corporation is taken from one of its officers in the absence of any statute authorizing the officer to sue in his own name, an action therefor can only be brought by the corporation. *Perkins* v. *Weston*, 3 Cush. 549. A tenant in common of personal property in possession may maintain trespass against his co-tenant who takes it by force (*Dailey* v. *Grimes*, 27 Md. 440; *King* v. *Phillips*, 1 Lans. 421; 43 N. Y. [4 Hand] 152); or destroys it. *Redington* v. *Chase*, 44 N. H. 36. When personal property is held in common, all of the owners must join in an action for the injury of it. If one of the tenants in common dies after the injury is sustained, the right of action survives to his co-tenants. *Bucknam* v. *Brett*, 35 Barb. 596; 22 How. 233; 13 Abb. 119.

Although, where personal property is sold upon a condition which is not performed, the seller may maintain trespass against a third person who has the property in his possession and refuses to give it up, notwithstanding the buyer has already recovered damages for the taking (*Hasbrouck* v. *Lounsbury*, 26 N. Y. 598); yet, when goods, which have been sold and delivered upon condition that the buyer make payment within a specified time, are attached in the hands of the buyer before the time of payment has arrived, as the seller has not the present right of possession, he cannot maintain trespass against the attaching creditor of the buyer. *Hurd* v. *Fleming*, 34 Vt. 169. If personal property which is mortgaged be wrongfully taken away, an action of trespass therefor may be brought by the mortgagee, although the mortgage debt is not due. *Foster* v. *Perkins*, 42 Me. 168; *Brackett* v. *Bullard*, 12 Metc. 308. When the parties to a mortgage of personal property agree that the mortgagor may keep possession of it, but that, if it is attached by another creditor or the mortgagee deems himself insecure, the latter shall have the right to immediate possession, an action of trespass will lie at the suit of the mortgagee for the removal of the property by an officer under an attachment or execution against the mortgagor. *Welch* v. *Whittemore*, 25 Me. 86; *Farrell* v. *Hil-*

*dreth*, 38 Barb. 178. So, where the agreement between the mortgagor and mortgagee is that, upon default in payment, the goods shall, on demand, be delivered to the latter, an action of trespass may be maintained by the mortgagee against a person who, after the time of payment has expired, takes the goods away, although no demand for the property has previously been made on such person. *Boise* v. *Knox*, 10 Metc. 40. And trespass will lie in behalf of a mortgagee in possession against one who seizes the goods, notwithstanding the mortgage be subsequently adjudged void and ordered to be delivered up to be canceled. *Perry* v. *Chandler*, 2 Cush. 237. If a second mortgagee of goods is in possession, he may maintain trespass for the wrongful taking of them, although the first mortgage has not been paid. *White* v. *Webb*, 15 Conn. 302. When a mortgage of personal property is given for the debt of a third person, the mortgagor may maintain trespass against a stranger for its removal, a mortgage only affecting the mortgagor's right of possession as respects the mortgagee and those claiming under him. *Cram* v. *Bailey*, 10 Gray, 87; *Hanmer* v. *Wilsey*, 17 Wend. 91.

Where the fraudulent vendee of goods sells and delivers them to a *bona fide* purchaser, the owner cannot maintain trespass for them (*Parker* v. *Patrick*, 5 Term R. 175; *Ladd* v. *Blunt*, 4 Mass. 402; *Mowrey* v. *Walsh*, 8 Cowen, 238; *Hunter* v. *Perry*, 33 Me. 159); and the same is the case where the sale is made by an officer who has illegally seized the goods. *Wilson* v. *Barker*, 4 B. & Ad. 614; *Justice* v. *Mendell*, 14 B. Monr. 12; *Fiero* v. *Betts*, 2 Barb. 633. The person to whom the goods have thus come will however be answerable to the owner after demand and refusal to redeliver them (*Tallman* v. *Turck*, 26 Barb. 167); unless the owner, upon discovering the fraud, ratify the sale either directly or by delay in reclaiming the goods. *Ash* v. *Putnam*, 1 Hill, 302; *Woolsey* v. *Seely*, Wright, 360.

§ 5. **What title or possession required.** To maintain an action of trespass for the wrongful taking of goods, a person must have had, when the goods were taken, the actual or the constructive possession, or a general or special property in them and a right to their immediate possession. *Ward* v. *Macauley*, 4 Term R. 489; *Flanagan* v. *Wood*, 33 Vt. 332; *Clark* v. *Carlton*, 1 N. H. 110; *Winship* v. *Neale*, 10 Gray, 382; *Imlay* v. *Sage*, 5 Conn. 489; *Putnam* v. *Wyley*, 8 Johns. 432; *Creps* v. *Dunham*, 69 Penn. St. 456; *Hume* v. *Tufts*, 6 Blackf. 136; *Crenshaw* v. *Moore*, 10 Ga. 384; *Brown* v. *Thomas*, 26 Miss. 335; *Bell* v. *Monahan*, Dudley (S. C.), 38; *Miller* v. *Kirby*, 74 Ill. 242. This rule would exclude as plaintiff, a person who had contracted for the manufacture of an article previous to delivery and acceptance.

*Ledbetter* v. *Blassingame*, 31 Ala. 495. In the absence of actual possession neither a lien on goods for rent, nor the levy on them of a distress warrant without a sale will enable a person to maintain an action of trespass *de bonis asportatis*. *Dunning* v. *Fitch*, 66 Ill. 51.

If the owner of property has wholly parted with his right to its possession, he cannot maintain trespass for the unlawful taking of it although his title remain. *Newhall* v. *Dunlap*, 14 Me. 180; *Nash* v. *Mosher*, 19 Wend. 431; *Wilson* v. *Martin*, 40 N. H. 88. This is the case where his goods have been pledged by him; a pledgee having at common law an absolute right to retain the possession of the property pledged until the condition of the pledge has been fulfilled, not only against the pledgor but against every person who cannot show a paramount title. *Gay* v. *Smith*, 38 N. H. 171. See *Stief* v. *Hart*, 1 N. Y. 20. As an execution does not give the officer possession of personal property, but only a right to levy on it, he cannot before levy maintain an action founded upon an injury done to the possession. *Cluley* v. *Lockhart*, 59 Penn. St. 376. And an auctioneer who has possession of fixtures attached to the freehold for the purpose of selling them, the purchaser being bound to detach and take them away, has not such a possession as will support trespass for their wrongful removal. *Davis* v. *Danks*, 3 Exch. 435. A constructive possession cannot prevail against an actual possession. Therefore, where land sold or leased remains in the actual possession of the vendor or lessor, no constructive possession of the personal property on it can be inferred for the benefit of the vendee or lessee against such actual possession. *Flannagan* v. *Wood*, 33 Vt. 332.

Where the personal property of a person is united by him to the freehold of another so as to become a part of such freehold, the owner of the property has no right to sever it, and it cannot be taken by his creditors. *Goddard* v. *Bolster*, 6 Me. 427; *Mitchell* v. *Stetson*, 7 Cush. 435. If a person willfully mingle his goods with those of another so that they cannot be distinguished, the common law gives the whole to the one not consenting to the mixture. *Ward* v. *Eyre*, 2 Bulstr. 323; *Lupton* v. *White*, 15 Ves. Jr. 432; *Hart* v. *Ten Eyck*, 2 Johns. Ch. 62; *Fuller* v. *Paige*, 26 Ill. 358; *Bryant* v. *Ware*, 30 Me. 295; *Stephenson* v. *Little*, 10 Mich. 433. When, however, the articles so mingled are of the same kind and equal value, the injured party is only entitled to what belongs to him. *Beach* v. *Schmultz*, 20 Ill. 185; *Gilman* v. *Sanborn*, 36 N. H. 311; *Rider* v. *Hathaway*, 21 Pick. 298; *Hyde* v. *Cookson*, 21 Barb. 92. When the owner of property by his conduct causes the belief that the property belongs to another, and a third person in consequence thereof assumes reponsibility, or parts

with value, the owner cannot afterward set up his title to the injury of such person. *Thompson* v. *Blanchard*, 4 Comst. 303; *Rigney* v. *Smith*, 39 Barb. 383; *Hibbard* v. *Stewart*, 1 Hilton, 207. The mere possession of goods by one whose general and acknowledged business is not that of a seller of similar goods will not vest a title to them in a *bona fide* purchaser without notice as against the owner; but it is otherwise when the one intrusted with the possession has also the *indicia* of the right of disposal. *Saltus* v. *Everrett*, 20 Wend. 267.

§ 6. **What title or possession sufficient.** A person may have a qualified property in birds which make their nests in trees on his land so as to maintain an action of trespass against one who takes them therefrom. *Bishop of London's Case*, 14 Hen. 8, F. 1. The same is the case as respects deer in a park, rabbits in a warren, or fish in a private pond or tank. If a wild animal, having been reclaimed, has a collar or other mark placed upon it, and goes and returns at pleasure, trespass will lie against a person who takes or injures it. *Hadesden* v. *Gryssel*, Cro. Jac. 195; *Rigg* v. *Lonsdale*, 1 H. & N. 923. Although an unreclaimed swarm of bees belongs to the first one who hives them, yet if a swarm fly from the hive of a person, his qualified property continues as long as he can keep them in sight, and has power to follow them. *Goff* v. *Kilts*, 15 Wend. 550. And if they are taken or destroyed by another, although on his land, an action of trespass may be maintained against him therefor. *Merrils* v. *Goodwin*, 1 Root, 209; *Gillet* v. *Mason*, 7 Johns. 16. See Vol. 1, *Animals*.

If goods, after being wrongfully taken, are altered or improved, they still belong to the owner, and he may retake them or recover their improved value in an action for damages, and the same may be done as against a purchaser from the wrong-doer. *Hiscox* v. *Greenwood*, 4 Esp. 174; *Silsbury* v. *McCoon*, 3 N. Y. 379; *Snyder* v. *Vaux*, 2 Rawle, 423; *Wingate* v. *Smith*, 20 Me. 287; *Willard* v. *Rice*, 11 Metc. 493.

The receiptor of goods attached, who puts them in the hands of another, may maintain trespass against a third person who takes them away, the receiptor having constructive possession of them. *Burrows* v. *Stoddard*, 3 Conn. 160. So an owner of personal property, who allows another to use it without charge, may maintain trespass if it is taken away by a third person while being so used. *Lotan* v. *Cross*, 2 Camp. 464; *Long* v. *Bledsoe*, 3 J. J. Marsh. 307; *Walcot* v. *Pomeroy*, 2 Pick. 121; *Orser* v. *Storms*, 9 Cowen, 687; *Staples* v. *Smith*, 48 Me. 470. When goods are deposited as security for a loan, the lender having the right to sell them, and after deducting the amount of the loan to pay over the balance to the borrower, and the lender exchanges the goods for other property, the bringing of an action by the borrower

against a person, who has attached such other property as belonging to the lender, will be deemed a ratification of the exchange. *Strong* v. *Adams*, 30 Vt. 221.

§ 7. **Property in custody of an officer.** Where personal property has been seized by an officer, it is forthwith in the custody of the law, and it cannot lawfully be meddled with by any one (*Skinner* v. *Stuart*, 39 Barb. 206); and if the officer leaves it in the hands of the debtor, the officer becomes liable to the creditor for its loss. *Browning* v. *Hanford*, 5 Denio, 586. When the officer intrusts the goods to the care of a third person, they are still deemed in the custody of the officer. *Barrett* v. *White*, 3 N. H. 210.

An officer who has levied upon personal property may maintain an action of trespass against a person who removes it (*Lockwood* v. *Bull*, 1 Cowen, 322); notwithstanding the officer neglected to sell the property pursuant to advertisement (*Earl* v. *Camp*, 16 Wend. 562); or the assignment of it by the debtor to the creditor in payment of the judgment (*Fletcher* v. *Cole*, 26 Vt. 170); or the agreement of the creditor that he would protect the officer from liability (*Huntley* v. *Bacon*, 15 Conn. 267); but not if the process under which the officer claims the property is void (*Earl* v. *Camp*, 16 Wend. 562); nor, if he has consented to its removal (Id.); nor if he has lost his lien by abandoning the property after its seizure. *Taintor* v. *Williams*, 7 Conn. 271. It will, however, be no defense that the execution was not returned, if the goods were taken from the officer's possession before the return day (*Sewell* v. *Harrington*, 11 Vt. 141); nor, that the property was mortgaged before it was levied on, nor that it belonged to a third person, unless the alleged trespasser connect himself with the outstanding title; nor that the goods were exempt from seizure, such an objection being only admissible for the judgment debtor. *Gibbs* v. *Chase*, 10 Mass. 125. Trespass may be maintained by an officer for the wrongful taking of property levied on without producing the judgment. *Smith* v. *Burtis*, 6 Johns. 197. But it is otherwise if the action be brought for the benefit of the execution creditor or of the plaintiff in an attachment. *Earl* v. *Camp*, 16 Wend. 562. When goods are in the hands of an officer, wrongfully, but under a claim of right, as they are in the custody of the law, and the owner has neither the actual nor the constructive possession of them, he cannot maintain trespass *de bonis asportatis* against a third person. *Hunt* v. *Pratt*, 7 R. I. 283.

§ 8. **Property in care of servant or agent.** If personal property is wrongfully taken from a servant, an action therefor must be brought by the master. *Brownell* v. *Manchester*, 1 Pick. 232. Accordingly, where the owner of goods delivered them to a cartman to be carried to the

latter's house, and kept until the following day, it was held that the owner of the goods was the proper person to bring an action of trespass against a stranger for taking them away. *Thorp* v. *Burling*, 11 Johns. 285.

When goods are in the possession of an agent, the action may be brought either by the agent or the principal. *Craig* v. *Gilbreth*, 47 Me. 416; *Morse* v. *Pike*, 15 N. H. 529; *Thomas* v. *Snyder*, 23 Penn. St. 515; *Mitchell* v. *Stetson*, 7 Cush. 435. If the lien of a factor is lost by pledging the goods for his own debt, or allowing them to be attached, or by otherwise parting with them voluntarily, the owner may maintain trespass for their wrongful removal. *Holly* v. *Hungerford*, 8 Pick. 73. If a person has possession of goods for his own use, by delivery from the owner, and such person delivers them to another to take to a different place, the owner cannot maintain trespass against the latter, for the reason that the action only lies for an injury to the possession. *Nash* v. *Mosher*, 19 Wend. 431; *Hurd* v. *Fleming*, 34 Vt. 169; *Wilson* v. *Martin*, 40 N. H. 88. And it is the same when the property is delivered by the owner to another to be used for a specified time, and the latter keeps and uses it beyond the time, though in such case the owner might maintain trespass against a third person who took away or used the property after the expiration of the time. *Bradley* v. *Davis*, 14 Me. 44.

In cases of bailment, unless the bailee has the absolute right to retain possession of the property for a definite time, an action of trespass against a wrong-doer may be brought either by the bailor or the bailee. *Strong* v. *Adams*, 30 Vt. 221; *Cowing* v. *Snow*, 11 Mass. 415; *Gilson* v. *Wood*, 20 Ill. 37; *Brownell* v. *Manchester*, 1 Pick. 232; *Brownell* v. *Cranley*, 3 Duer, 9. But if the bailee of goods be entitled to their possession for a specified time, he alone can maintain the action. *Neff* v. *Thompson*, 8 Barb. 213; *Wilson* v. *Martin*, 40 N. H. 88; *Muggridge* v. *Eveleth*, 9 Metc. 233.

§ 9. **Goods of deceased person.** When personal property which belonged to a person deceased in his life-time is tortiously taken, an action therefor may be brought by his executor or administrator in his own name instead of his representative character. *Patchen* v. *Wilson*, 4 Hill, 57. If the goods were wrongfully seized between the time of the death of the testator or intestate, and the grant of letters testamentary or of administration, an action of trespass therefor may be maintained by the personal representatives without a previous demand. *Tharpe* v. *Starrwood*, 5 Man. & G. 760; *Hutchins* v. *Adams*, 3 Me. 161.

A near relative of a deceased person who was in the house of the

deceased at the time of his death will be liable in trespass, brought by the executors, for merely removing some jewelry of the deceased from one room to another, even though done, *bona fide*, for its preservation. *Kirk* v. *Gregory*, L. R., 1 Q. B. D. 55; 16 Eng. R. 529.

§ 10. **Taking of exempt property by officer.** Trespass is the proper form of action, at common law, for the seizure of goods by an officer, which are exempt (*Davlin* v. *Stone*, 4 Cush. 359; *Kiff* v. *Old Colony, etc., R. R. Co.*, 117 Mass. 591; 19 Am. Rep. 429); and the mere wrongful exercise of dominion over the goods by the officer without taking actual possession of, or removing them, will make him a trespasser. *Paxton* v. *Stecker*, 2 Penn. St. 93; *Miller* v. *Baker*, 1 Metc. 27; *Wintringham* v. *Lafoy*, 7 Cowen, 735. Such will be the case, notwithstanding the silence of the owner of the property, or the ignorance of the officer that it is exempt. *Dow* v. *Smith*, 7 Vt. 465; *Foss* v. *Stewart*, 14 Me. 312; *Deyo* v. *Jennison*, 10 Allen, 410; *Frost* v. *Mott*, 34 N. Y. 253; *Lynd* v. *Pickett*, 7 Minn. 184. Where, however, certain of the effects of the debtor are exempt by law from seizure and sale on execution, to be selected by him, an action of trespass will not lie against the officer for selling them unless the debtor notifies the officer at the time of the levy or soon thereafter that he has made the selection. *Frost* v. *Shaw*, 3 Ohio St. 270. But an officer, who by virtue of a precept against A, sells the goods of B, will make himself liable, although the judgment creditor told the officer that the property belonged to A, and B gave no notice to the contrary. *Roberts* v. *Thomas*, 6 Term R. 88; *Sanderson* v. *Baker*, 2 W. Bla. 832; *Samuel* v. *Duke*, 3 M. & W. 622; *Lothrop* v. *Arnold*, 25 Me. 136; *Angell* v. *Keith*, 24 Vt. 371; *Rogers* v. *Weir*, 34 N. Y. 463. An exception in such case will arise if the owner of the goods acquiesce in their seizure and sale, or permit the judgment debtor to exercise acts of ownership over the property, without giving the officer notice or making any demand upon him for it. *Fiero* v. *Betts*, 2 Barb. 633; *Vose* v. *Stickney*, 8 Minn. 75. See *Otis* v. *Sill*, 8 Barb. 103. Where the goods of a person which are capable of being identified have become intermingled with those of the debtor without the fault of the owner, an officer, who seizes the whole without inquiry under process against the debtor, will make himself a trespasser thereby. *Stickney* v. *Davis*, 16 Pick. 19. But if the goods are not distinguishable, to make the officer liable there must have been a previous demand and refusal. *Shumway* v. *Rutter*, 8 Pick. 443; *Taylor* v. *Jones*, 42 N. H. 25; *Wellington* v. *Sedgwick*, 12 Cal. 469; *Yates* v. *Wormwell*, 60 Me. 495. If an officer seize personal property owned by two tenants in common under an execution against one of them, and sells the whole property instead of merely

the interest of the judgment debtor, he becomes a trespasser *ab initio*. *Johnson* v. *Evans*, 7 M. & G. 240; *Melville* v. *Brown*, 15 Mass. 82; *Sheppard* v. *Shelton*, 34 Ala. 652; *Walsh* v. *Adams*, 3 Denio, 125. And the same is the case when an officer sells the entire goods of a firm on an execution against a partner for his individual debt, instead of selling the share of such partner (*Walker* v. *Fitts*, 24 Pick. 191; *Waddle* v. *Cook*, 2 Hill, 47; *Moore* v. *Pennell*, 52 Me. 162); or the whole interest in personal property on an execution against the mortgagor. *Wheeler* v. *McFarland* 10 Wend. 318; *Frisby* v. *Langworthy*, 11 Wis. 375. If an officer attach and take possession of property which is held under a previous attachment, and which is insufficient to satisfy the claim for which the first attachment was issued, he will be liable as a trespasser. *West River Bank* v. *Gorham*, 38 Vt. 649. Where, however, the receiptor of goods attached has permitted the goods to be held and used by the owner, an officer who has no notice of the prior attachment may lawfully attach them (*Robinson* v. *Mansfield*, 13 Pick. 139); but not otherwise. *Carpenter* v. *Cummings*, 40 N. H. 158. The sureties in a bond of indemnity, given to the officer to procure a sale on execution of the property of a third person, are trespassers. *Murray* v. *Ezell*, 3 Ala. 148; *Wetzell* v. *Waters*, 18 Mo. 396; *Davis* v. *Newkirk*, 5 Denio, 92.

§ 11. **Taking by private person.** When a person permits personal property, which has been seized under process irregularly executed, to be retained for his benefit or refuses to give up the property, he will be liable although it was taken in his absence. *Smith* v. *Felt*, 50 Barb. 612; 51 N. Y. (6 Sick.) 842; *Harrison* v. *Mitchell*, 13 La. Ann. 260; *Lewis* v. *Johns*, 34 Cal. 629; *Alfred* v. *Bray*, 41 Mo. 484; *Cook* v. *Hopper*, 23 Mich. 411. So, if an execution has been satisfied and the officer continues to act under it by direction of the plaintiff, they will both be trespassers. *Vail* v. *Lewis*, 4 Johns. 450; *Collins* v. *Waggoner*, Breese, 51. It is no defense that one acted in aid of an officer if the officer was himself a trespasser. *Durling* v. *Kelly*, 113 Mass. 29. Where an agent acting within the scope of his authority causes the wrongful seizure of personal property, his principal will be liable in trespass therefor. *Jarman* v. *Hooper*, 13 L. J. (N. S.) 63; *Mills* v. *Dawson*, Peake's Add. Cas. 50.

§ 12. **Acts done by military authority.** Substantially the same principles of law with respect to an interference with private rights govern in these cases as in those of the exercise of civil authority. That is, acts of military officers or courts within the scope of their jurisdiction are protected, while such as are in excess of their jurisdiction are actionable. See *ante*, p. 49, Art. 1, § 10. What, however, may be done by a military

officer in the discharge of his duty during a period of great public peril will be regarded by the civil tribunals with indulgence, though it transcend the strict limits of his authority. *Clow* v. *Wright*, Brayt. 118; *Hawley* v. *Butler*, 54 Barb. 490. See *Martial Law*.

§ 13. **Collection of taxes.** When personal property is taken for taxes without authority of law, the wrong-doer will be liable to an action of trespass therefor. *Cavis* v. *Robertson*, 9 N. H. 524. To justify the seizure of goods for taxes, there must have been a legal tax which the owner of the goods was liable to pay and a law authorizing the issuing of process to some person to collect it, which process must have been issued to the person designated by the statute, who must have acted strictly in conformity therewith. *Cloutman* v. *Pike*, 7 N. H. 209; *Pearce* v. *Torrance*, 2 Grant, 82; *Stephens* v. *Wilkins*, 6 Penn. St. 260. If the tax warrant be in proper form, and issued by competent authority, it will protect the collector in executing it, but not otherwise. *Reynolds* v. *Moore*, 9 Wend. 35; *Upton* v. *Holden*, 5 Metc. 360; *Kelly* v. *Noyes*, 43 N. H. 209; *Eames* v. *Johnson*, 4 Allen, 382; *Briggs* v. *Whipple*, 7 Vt. 15; *Wise* v. *Withers*, 3 Cranch, 331; *Sanford* v. *Dick*, 15 Conn. 447. It has been held that if the collector sells goods for taxes after the time prescribed by statute, he will be deemed a trespasser *ab initio*. *Pierce* v. *Benjamin*, 14 Pick. 356; *contra*, *Factory* v. *McConike*, 7 N. H. 309. Where the collector having sold more goods than are necessary to pay the tax and expenses of sale, proceeds and sells the balance, he will not thereby become a trespasser *ab initio*, but will only be liable for the excess. *Seekins* v. *Goodale*, 61 Me. 400; 14 Am. Rep. 568.

§ 14. **Wrongful acts after lawful taking.** In general, where a person at first proceeds with propriety under an authority given by law, but afterward commits a wrong under such circumstances as lead to the belief that he intended it from the beginning, he thereby forfeits all the protection which the law would otherwise afford him and is regarded as a trespasser for the whole. *Hyde* v. *Cooper*, 26 Vt. 552; *Bean* v. *Hubbard*, 4 Cush. 85; *Page* v. *Dupuy*, 40 Ill. 506. The rule is most frequently exemplified in the case of an officer who, having legal process to execute, abuses and perverts it to other purposes. *Allen* v. *Crofoot*, 5 Wend. 506; *Ross* v. *Philbrick*, 39 Me. 29. Where a street commissioner, who had lawful authority to remove a building from the street, sold portions of it, it was held that he thereby became a trespasser *ab initio*, and liable for the value of the building. *Mussey* v. *Cummings*, 34 Me. 74. An officer who, having attached goods in a house, places there an unsuitable person in charge of them against the objection of the occupier of the house, will be liable as a

trespasser *ab initio*. *Malcom* v. *Spoor*, 12 Metc. 279. And an officer has been held a trespasser *ab initio*, when the person with whom he has deposited goods for safe-keeping uses them without the knowledge of the officer. *Briggs* v. *Gleason*, 29 Vt. 78; *contra*, *Barron* v. *Cobleigh*, 11 N. H. 557. When a person takes personal property by permission of the owner, he will be liable as a trespasser, if he keeps or disposes of the property after the license has been revoked. *Willis* v. *Truesdell*, 6 Pick. 455; *Ockington* v. *Richey*, 41 N. H. 275. But a mere error or mistake, such as any person exercising ordinary care might commit, will not constitute such a departure from the line of duty as to make one a trespasser from the beginning. *Taylor* v. *Jones*, 42 N. H. 25.

## ARTICLE X.

### WHO MAY BE SUED.

**Section 1. In general.** As a person can only be deprived of his property by his voluntary act or by operation of law, any one who meddles therewith without authority may be sued therefor. It is a well-established rule that if one man wrongfully and by force takes from another man his goods, or compels him to give security for money, or procures the estate of another to be wrongfully levied on or attached, trespass will lie against the wrong-doer. *Sprague* v. *Birchard*, 1 Wis. 457; *Stone* v. *Chambers*, 1 Strobh. 117; *Bird* v. *Clark*, 3 Day, 272; *Merritt* v. *Read*, 5 Denio, 352; *Stetson* v. *Goldsmith*, 30 Ala. 602; *Glover* v. *Horton*, 7 Blackf. 295; *McNeeley* v. *Hunton*, 30 Mo. 332; *Woodbridge* v. *Conner*, 49 Me. 353. Trespass will lie against a deputy clerk who wrongfully issues an execution under which goods are sold. *Coltraine* v. *McCain*, 3 Dev. 308. Where a landlord gave to an officer a warrant of distress and directed him to serve it, and the officer made an illegal levy and sale, it was held that the landlord was liable to his tenant for damages caused by such levy and sale. *Parkerson* v. *Wightman*, 4 Strobh. 363. A party will be liable in trespass if it is shown that he came in aid of the person who committed it, although he took no further part in it. *Clark* v. *Bales*, 15 Ark. 452.

A corporation may be sued in trespass for taking and appropriating personal property. *Maund* v. *Monmouthshire Canal Co.*, 2 Dowl. (N. S.) 113. Where goods have been wrongfully taken by a deputy sheriff, the injured party may, at his election, bring his action against the deputy or the sheriff. *Walker* v. *Foxcroft*, 2 Me. 270; *Campbell* v. *Phelps*, 17 Mass. 244. Trespass will lie against an infant for carrying away goods, though done by the command of his father

(*Scott* v. *Watson*, 46 Me. 362); or for injuring personal property. *Campbell* v. *Stakes*, 2 Wend. 137.

§ 2. **Joint trespassers.** A wrong committed by a number of persons is *per se* several in its character and only joint because each is by law made liable for the acts of all done in furtherance of the common design. *Ayer* v. *Ashmead*, 31 Conn. 447. The principles of law applicable to joint trespassers have already been considered, *ante*, p. 53, Art. 3, § 2. If a carriage be jointly hired by several persons with the understanding that it shall remain in the sole charge of the driver, and one of the persons causes an injury to the horses and carriage, the hirers are jointly liable for the damage. *O'Brien* v. *Bound*, 2 Speers, 495. And if the owner of a carriage rides with two persons to whom he has loaned it, the three will be liable for an injury done to another carriage by reckless driving. *Bishop* v. *Ely*, 9 Johns. 294. Where a horse was wrongfully attached and the officer, while it was in his custody, wrongfully attached it a second time on a writ in favor of another creditor, it was held that the owner of the horse might maintain trespass against the officer and the second attaching creditor jointly. *Cox* v. *Hall*, 18 Vt. 191. If a bond of indemnity is executed by a creditor to the officer after a wrongful levy, the creditor is a joint trespasser with the officer as to all that is subsequently done with the property. *Lovejoy* v. *Murray*, 3 Wall. 1.

## ARTICLE XI.

### DEFENSES.

**Section 1. In general.** The defendant may set up in defense that he did not commit the alleged trespass, or he may justify the act charged on the ground that he had a right to the possession of the property and that the taking of it by him was lawful. *Dane* v. *Gilmore*, 49 Me. 173. With reference to the mode of making the defense, it is sufficient if the defense be substantially set out in the plea. *Burdick* v. *Worrall*, 4 Barb. 596. The general issue operates as a denial of the right of property or possession in the plaintiff as against the defendant at the time of the trespass. *Fuller* v. *Rounceville*, 29 N. H. 554. But a release, or any matter which, while it admits the taking, claims that it was lawful under the circumstances, must be specially pleaded. *Strong* v. *Hobbs*, 20 Vt. 185; *Butterworth* v. *Soper*, 13 Johns. 443, *Glazer* v. *Clift*, 10 Cal. 303. The defendant may show under a general denial that the taking was with the plaintiff's consent. *Wallace* v. *Robb*, 37 Iowa, 192.

It is no defense, where the goods were taken by the deliberate and voluntary act of the defendant, that he did not intend to commit a trespass (*Hobart* v. *Haggett*, 12 Me. 67; *Dexter* v. *Cole*, 6 Wis. 319; *Hamilton* v. *Hunt*, 14 Ill. 472; *Amick* v. *O'Hara*, 6 Blackf. 258; *Johnson* v. *Stone*, 40 N. H. 97); nor that they were in the plaintiff's possession for the purpose of being sold by him in violation of law. *Fuller* v. *Bean*, 30 N. H. 181; *Hamilton* v. *Goding*, 55 Me. 419; *Arthur* v. *Flanders*, 10 Gray, 107. An action for carrying away personal property, under an attachment against a third person, will not be barred by a previous action brought by the same plaintiff, which was dismissed on the ground that the property had not, at the commencement of the first action, been removed. *Clark* v. *Harrington*, 4 Vt. 69. Where in an action for trespasses committed at two different times, the defendant moves that the trial proceed as to one which is done, a verdict for the plaintiff therein will not bar a second action for the other injury. *Snider* v. *Croy*, 2 Johns. 227. The mere return of personal property by one who has wrongfully taken it, and its acceptance by the owner, will not bar an action of trespass for the taking, though it may go in mitigation of damages. So, the fact that a person, whose goods are illegally seized, afterward agrees that they may be disposed of, does not affect his right of action for the seizure. *Walker* v. *Fuller*, 29 Ark. 448. A judgment in replevin, with a return of the property, will bar an action of trespass for the same goods, notwithstanding the damages awarded in the replevin suit have not been paid. *Karr* v. *Barstow*, 24 Ill. 580. So, a judgment in replevin against one of two joint defendants for part of the goods taken and carried away, will bar an action subsequently brought against both for the same trespass, unless it appears that the defendants destroyed, concealed or sold the rest of the property so that it could not be replevied. *Bennett* v. *Hood*, 1 Allen, 47. But it is otherwise as to a judgment in replevin against the buyer of personal property sold by an officer, there being still a right of action against the officer for the original taking. *Nagle* v. *Mullison*, 34 Penn. St. 48.

§ 2. **Defense of person or property.** It is lawful to repel force by force in defense of one's person, habitation or goods against an intruder who manifestly intends or endeavors, by violence and surprise, to commit a known felony (Foster's Cr. L. 259); and any other person present may assist the party assailed. *Scribner* v. *Beach*, 4 Denio, 448; *State* v. *Moore*, 31 Conn. 479. Where a person was stealing in the night and the owner of the goods, in consequence of the darkness, could not distingush the thief and had reason to believe that he could not be apprehended, it was held that the owner might shoot with

intent to disable. *McClelland* v. *Kay*, 14 B. Monr. 84. But the right of the owner of personal property to rescue it from a trespasser is not restricted to such extreme cases. If he discover a person wrongfully carrying off his goods in the day time, he may lawfully retake them, using all the force necessary to effect that object. *Blades* v. *Higgs*, 10 C. B. 713; *Baldwin* v. *Hayden*, 6 Conn. 453; *Gyre* v. *Culver*, 47 Barb. 592.

§ 3. **Acts done under lawful process.** It has been seen *ante*, p. 52, Art. 1, § 14, that process affords protection to the officer acting under it when it is regular on its face and is issued by a court having jurisdiction of the subject-matter. If the want of jurisdiction is only to the person or place, the officer is also protected, unless such want of jurisdiction is shown by the process. *Cloutman* v. *Pike*, 7 N. H. 209; *Milburn* v. *Gilman*, 11 Mo. 64; *Barnes* v. *Barber*, 1 Gilm. (Ill.) 401; *McDonald* v. *Wilkie*, 13 Ill. 22. An execution which is voidable only, and not void, will protect both the officer and the party. *Wilmarth* v. *Burt*, 7 Mete. 257; *Batchelder* v. *Currier*, 45 N. H. 460. Although satisfied in fact, yet if the officer has no knowledge of its satisfaction, he will not be liable as a trespasser for proceeding under it. *Thrower* v. *Vaughan*, 1 Rich. 18. So, an officer will be protected who, in good faith, makes a levy, after being told by the defendant in the execution that the debt has been settled (*Lampson* v. *Fletcher*, 1 Vt. 168; *Twitchell* v. *Shaw*, 10 Cush. 46); or that the case has been appealed. *Foster* v. *Wiley*, 27 Mich. 244; 15 Am. Rep. 185. The authority implied by law from a party causing process to be issued, is to do only lawful acts pursuant to the process, and he cannot, without other evidence, be made liable for the acts of the officer in seizing goods which do not belong to the judgment debtor. Nor will the presence of an attorney of the party, and his directions to the officer to seize and sell the goods in the absence of proof of special authority, make such party responsible. *Welsh* v. *Cochran*, 63 N. Y. 181; 20 Am. Rep. 519.

§ 4. **Title in defendant.** The defendant may justify the taking on the ground that he has a right to the property, either personally or as agent of the owner, or as an officer armed with legal process. *Dane* v. *Gilmore*, 49 Me. 173.

§ 5. **Title in third person.** It is not a defense that a third person is the owner, unless the alleged wrong-doer connect himself with such third person (*Wooley* v. *Edson*, 35 Vt. 214; *Cook* v. *Howard*, 13 Johns. 276; *Hanmer* v. *Wilsey*, 17 Wend. 91; *King* v. *Orser*, 4 Duer, 431); no one but the owner or one connecting himself with the owner, being at liberty to impeach the plaintiff's title. *Toby* v. *Reed*, 9 Conn. 216; *Davis* v. *Young*, 20 Ala. 151.

§ 6. **Damages.** The plaintiff will be entitled to recover damages for all the injury he sustained in consequence of the trespass, notwithstanding an offer by the defendant to return the goods wrongfully taken, or his afterward causing them to be seized under an attachment or execution against the owner. *Higgins* v. *Whitney*, 24 Wend. 379; *Dennison* v. *Hyde*, 6 Conn. 507; *Rogers* v. *Fales*, 5 Penn. St. 154; *Woolley* v. *Carter*, 2 Halst. 85; *Young* v. *Mertens*, 27 Md. 114; *Hanmer* v. *Wilsey*, 17 Wend. 91; *Otis* v. *Jones*, 21 Wend. 394; *Tiffany* v. *Lord*, 65 N. Y. (20 Sick.) 310. If, however, the defendant permits judgment to be taken against him by default, the plaintiff will be restricted to nominal damages, unless he shows that he ought to have more. *Rose* v. *Gallup*, 33 Conn. 338. For the mere wrongful taking of personal property, without fraud or malice, the measure of damages would usually be the value of what was taken at the time of the taking with interest. *Woodham* v. *Gelston*, 1 Johns. 134; *Felton* v. *Fuller*, 35 N. H. 226; *Coolidge* v. *Choate*, 11 Metc. 79; *Engle* v. *Jones*, 51 Mo. 316; *Eby* v. *Schumacher*, 29 Penn. St. 40; *Farrel* v. *Colwell*, 30 N. J. 123. Cases might occur in which the owner of the property taken would be entitled to recover more than its value with interest, and others in which the damages allowed ought to be less. *Strasburger* v. *Barber*, 38 Md. 103; *Longfellow* v. *Quimby*, 33 Me. 457. Instead of interest, the value of the use during the time the owner of the goods is deprived of them may be shown. *Warfield* v. *Walter*, 11 Gill & Johns. 80. Where the property has been restored to the owner or sold on an execution against him, the measure of damages is not its value, but the loss actually sustained. *Hunt* v. *Haskell*, 24 Me. 339; *Felton* v. *Fuller*, 35 N. H. 226; *Curtis* v. *Ward*, 20 Conn. 204; *Collins* v. *Perkins*, 31 Vt. 624; *Barry* v. *Bennett*, 7 Metc. 354; *Ward* v. *Henry*, 15 Wis. 239. If the action is brought by one who has a special property in the goods against the owner, the measure of damages is the value of the plaintiff's interest in them at the time they were taken. *Brierly* v. *Kendall*, 17 Adol. & El. (N. S.) 937; *Criner* v. *Pike*, 2 Head, 398. But when the action is by the bailee against a stranger, the plaintiff is entitled to recover according to the general rule, that is, the value of the property and interest. *Russell* v. *Butterfield*, 21 Wend. 300. Although it is not proper for the jury, in estimating the damages, to take into consideration remote or speculative losses (*Sims* v. *Glazener*, 14 Ala. 695; *Boyd* v. *Brown*, 17 Pick. 453; *Anthony* v. *Gilbert*, 4 Blackf. 348; *Callaway, etc., Co.* v. *Clark*, 32 Mo. 305); yet it is otherwise as to such future injury as will be likely to result from the wrongful act. *Dennison* v. *Hyde*, 6 Conn. 507; *Allred* v. *Bray*, 41 Mo. 484; *Sher-*

*man* v. *Dutch*, 16 Ill. 283; *Williams* v. *Ives*, 25 Conn. 568. Where the wrongful act is proved to have been committed maliciously, wantonly, or with the view of obtaining unlawfully and with a fraudulent intent, a benefit to the defendant by means of the injury to the property, or the trespass was accompanied with insulting and abusive language, exemplary damages may be allowed. *Milburn* v. *Beach*, 14 Mo. 104; *McCullough* v. *Walton*, 11 Ala. 492; *Treat* v. *Barber*, 7 Conn. 274; *Wylie* v. *Smitherman*, 8 Ired. 236; *Anthony* v. *Gilbert*, 4 Blackf. 348; *Storm* v. *Green*, 51 Miss. 103; *Champion* v. *Vincent*, 20 Tex. 811.

Where a landlord takes his tenant's corn under an honest belief that he has a right to sell it and divide the proceeds without any notice of a division by the tenant, exemplary damages should not be given in an action of trespass by the tenant. *Scott* v. *Bryson*, 74 Ill. 420.

A tender by the trespasser of the amount paid by the owner of property wrongfully taken, to get it back, will not diminish the damages which the plaintiff is entitled to recover. *Clark* v. *Hallock*, 16 Wend. 607. But a return of the property and acceptance of it by the owner may be shown in mitigation of damages (*Gibbs* v. *Chase*, 10 Mass. 125; *Caldwell* v. *Arnold*, 8 Minn. 265); or, that it was taken from the trespasser by a third person and applied to the owner's use, though without his consent (*Wehle* v. *Butler*, 43 How. Pr. 5; *Wehle* v. *Haviland*, id. 399); or, that the goods were not the property of the plaintiff, and that they went to the use of the owner (*Nightingale* v. *Scannell*, 18 Cal. 315); or, that the property was attached or taken in execution, in the hands of the trespasser, upon legal process issued against the owner, and that they have been applied in satisfaction of the owner's debt, or otherwise for his benefit. *Higgins* v. *Whitney*, 24 Wend. 379; *Hopple* v. *Higbee*, 3 Zab. 342; *Kaley* v. *Shed*, 10 Metc. 317. Where cattle, which had been wrongfully driven away, were taken from the possession of the wrong-doer on writs of attachment against the owner, sold, and the proceeds applied on writs of execution against the owner, it was held that such wrong-doer was only liable to damages up to the time of the attachment, notwithstanding the subsequent proceedings of the officer might have been illegal. *Montgomery* v. *Wilson*, 48 Vt. 616. Although the owner of personal property, wrongfully taken, agree with the trespasser that if he will return it, he will relinquish all claim for damages for the taking, yet the owner may repudiate the agreement, and if the wrong-doer afterward returns the property, such return will not discharge his liability. *Smith* v. *McCall*, 48 Vt. 422.

§ 7. **Judgment and its effect.** Although where an officer has levied upon goods in possession of the defendant in the execution, and it has

been afterward taken from him by a third person, he may sustain an action against such person upon his title and possession under the execution alone, yet, any other person, who claims the benefit of the official acts of the officer, must prove the judgment, and the officer must do the same, when he asserts a *quasi* title by virtue of the levy as against any other person than the judgment debtor. *Mower* v. *Stickney*, 5 Minn. 397; *Lake* v. *Billers*, 1 Ld. Raym. 733; *Savage* v. *Smith*, 2 W. Bla. 1104; *Cook* v. *Miller*, 11 Ill. 610; *Sexey* v. *Adkinson*, 34 Cal. 346; *Hall* v. *Stryker*, 27 N. Y. 596.

When the verdict is for the plaintiff as to a part of the issue, and for the defendant as to a part, and judgment is erroneously entered in behalf of the plaintiff on the entire issue, it will be amended. *Routledge* v. *Abbott*, 8 Ad. & E. 592. Where in an action against joint trespassers, or a separate action against each for the same trespass, judgment having been rendered for the plaintiff, and execution issued, one of the defendants is committed to jail, but afterward released therefrom by direction of the plaintiff or his assignee, the judgment is thereby discharged as to both defendants. *Kasson* v. *People*, 44 Barb. 347. A judgment against several defendants may be reversed as to one or more of them, and affirmed as to the rest. *Van Slyck* v. *Snell*, 6 Lans. 299. Interest will not be allowed on a judgment for the plaintiff, in an action of trespass, which is affirmed on a writ of error. *Gelston* v. *Hoyt*, 13 Johns. 561. The payment of a judgment for the plaintiff, in an action for taking and carrying away goods, entitles the defendant to them, although some of the goods were the property of the plaintiff's wife before marriage. *Schindel* v. *Schindel*, 12 Md. 108.

## ARTICLE XII.

### TRESPASS TO THE PERSON.

**Section 1. In general.** Trespass will be committed when any one who, having the present ability to injure, unlawfully attempts to do violence to the person of another in a wanton, willful, angry, or insulting manner. *Stephen* v. *Myers*, 4 Car. & P. 349; *State* v. *Sims*, 3 Strobh. 137; *Higginbotham* v. *State*, 23 Tex. 574; *State* v. *Malcolm*, 8 Iowa, 413; *Com.* v. *Ruggles*, 6 Allen, 588; *State* v. *Vannoy*, 65 N. C. 532. Every rude or hostile touching of another, unless done through inevitable accident, or in self-defense, or in defense of one's property, or under sanction of law, is a trespass (*Griffin* v. *Coleman*, 4 H. & N. 265; 28 L. J. Exch. 134; *Wright* v. *Court*, 4 B. & C. 596; *State* v. *Baker*, 65 N. C. 332); and when the offense is accompanied by cir-

cumstances of intimidation, indignity, or insult, it will be deemed an aggravated trespass. *Ward's Case*, 4 Clayton, 44; *Cole* v. *Turner*, 6 Mod. 149; *James* v. *Campbell*, 5 C. & P. 372. In an action for an injury to the plaintiff's testicles by squeezing, the defense was, that it was done in play. The court held, that if the parties were lawfully playing by mutual assent, and the act was no other than the plaintiff had reason to suppose would happen in such play, the defendant was not liable; but that if the defendant intended to do the act, and the act was unlawful and unjustifiable and caused bodily harm, an action would lie, and that the jury were to find the facts from the evidence. *Fitzgeral* v. *Cavin*, 110 Mass. 153. A person, who is injured in consequence of the reckless driving of another, may maintain trespass therefor. *Rappelyea* v. *Hulse*, 7 Halst. 257; *Churchill* v. *Rosebeck*, 15 Conn. 359; *McLaughlin* v. *Pryor*, 4 Scott (N. R.), 177; *Strohl* v. *Levan*, 39 Penn. St. 177. One who sets a spring-gun upon his premises to protect his fruit, but who does not give notice thereof, will be liable in trespass even to one who entered the premises for the purpose of taking fruit without permission. *Hooker* v. *Miller*, 37 Iowa, 613; 18 Am. Rep. 18. When seduction is attended with violence to the person of the female, an action of trespass will lie. *Hubbell* v. *Wheeler*, 2 Aiken, 359; *Koenig* v. *Nott*, 2 Hilton, 323.

Excepting in the case of seamen, if a master strike his servant even moderately, the servant may maintain an action against him therefor. *Newman* v. *Bennett*, 2 Chit. 195; *Matthews* v. *Terry*, 10 Conn. 455. The captain of a vessel will be liable if he makes his authority a pretext for cruelty and oppression, and inflicts unreasonable and immoderate chastisement upon the sailors under his command. Abb. on Ship. 125; *Brown* v. *Howard*, 14 Johns. 119. And the same is the case as respects authority exercised over the inmates of an alms-house by the keeper. *State* v. *Hull*, 34 Conn. 132.

When a master has been deprived of his servant's labor by an injury to the person of the latter, an action therefor may be brought both by the master and the servant. *Robert Mary's Case*, 9 Co. 205. At common law, if the injury be to the person of the wife, and the wife die *pendente lite*, the action abates. If the husband die before action brought, or *pendente lite*, the action survives to the wife. *Washburn* v. *Hale*, 10 Pick. 429; *Mann* v. *Marsh*, 35 Barb. 68. In several of the States, the common law rule has been changed by statute, and damages for injury to the person of the wife are no longer subject to the control of her husband, but are a part of the wife's separate property, the same as if she were a *feme sole*. *Ball* v. *Bullard*, 52 Barb. 141; *Jeanes* v. *Davis*, 3 Penn. L. J. 60; *Whiton* v. *Chicago, etc., R. R. Co.*, 21 Wis. 305.

An action of trespass is the proper remedy for false imprisonment, which consists in unlawfully depriving another of his liberty, although the party be merely detained in a public street, or be restrained only by words. *Bird* v. *Jones*, 7 Q. B. 742; *Williams* v. *Ivey*, 37 Ala. 242; *Bloomer* v. *State*, 3 Sneed, 66; *Johnson* v. *Maxon*, 23 Mich. 129; *Burns* v. *Erben*, 40 N. Y. 463; *Coupal* v. *Ward*, 106 Mass. 289. A person who keeps the key of a room, knowing that another is locked therein, is a trespasser. Bro. Abr., Trespass, pl. 133. So is one who maliciously causes an illegal arrest. *Clifton* v. *Grayson*, 2 Stew. 412; *Maher* v. *Ashmead*, 30 Penn. St. 344; *Huggins* v. *Toler*, 1 Bush, 192; *Cole* v. *Radcliff*, 4 W. Va. 332; *Roth* v. *Smith*, 41 Ill. 314. And if the process be void on its face, or upon an inspection of the record, the party will be deemed a trespasser though he was actuated by no malicious or improper motive. *Hayden* v. *Shed*, 11 Mass. 500; *Luddington* v. *Peck*, 2 Conn. 700; *Reynolds* v. *Corp*, 3 Caines, 267; *Price* v. *Graham*, 3 Jones, 545. It has been held that an officer who, in making an arrest, refuses to show his warrant when asked to do so, will be liable for assault and battery and false imprisonment. *Frost* v. *Thomas*, 24 Wend. 418. If he treat the person arrested with brutality, it will give the latter a cause of action. But resistance on the part of the prisoner with threats of violence will justify the use of all the force necessary to overcome such resistance. *Fulton* v. *Staats*, 41 N. Y. 498.

If the arrest be made without process, in order to justify the act, it must be shown that an offense punishable criminally had been committed, and that the defendant had reasonable cause to suspect the plaintiff (*Hogg* v. *Ward*, 3 H. & N. 417; *Allen* v. *Wright*, 8 C. & P. 522; *Boyleston* v. *Kerr*, 2 Daly, 220); or either that there was a breach of the peace at the time, or had been one, and there was danger of its renewal. *Wooding* v. *Oxley*, 9 C. & P. 1; *Grant* v. *Moser*, 5 M. & Gr. 123; *Price* v. *Seeley*, 10 Cl. & Fin. 28. Although an officer may lawfully enter a house to quell a breach of the peace, and may arrest and detain for a reasonable time any person engaged in an affray, or in committing an assault therein, yet he cannot do so after the disturbance has wholly ceased. 1 Hale's P. C. 587; *Prell* v. *McDonald*, 7 Kans. 426; 12 Am. Rep. 423. So, an officer cannot justify an arrest made without warrant when he arbitrarily detains the prisoner in custody, instead of taking him immediately before a magistrate as required by law. *Green* v. *Kennedy*, 46 Barb. 16; *Brock* v. *Stinson*, 108 Mass. 520; 11 Am. Rep. 390.

In an action for an illegal arrest or detention, it is sufficient for the plaintiff in his declaration to set forth the facts, without alleging that the act was malicious and without probable cause, or that

it was wrongful or contrary to law. *Gallimore* v. *Ammerman*, 39 Ind. 323. If the defendant seeks to justify an arrest made without process, on the ground of suspicion, he must state in his plea what offense had been committed, and set forth the facts which caused the suspicion. *Brown* v. *Chadsey*, 39 Barb. 253. Where the arrest was made to preserve the peace, the plea must set out the circumstances which the defendant claims justified the course pursued by him. *Wheeler* v. *Whiting*, 9 C. & P. 262; *Baynes* v. *Brewster*, 1 Gale & D. 669; *Grant* v. *Moser*, 5 M. & G. 123.

As the gist of an action for false imprisonment is the unlawful detention, actual violence need not be proved, although the offense is charged to have been committed with force and arms. *Perry* v. *Buss*, 15 N. H. 222. When the fact of imprisonment of the plaintiff is established, the burden of justifying it is on the defendant. *Holroyd* v. *Doncaster*, 3 Bing. 492; *Bassett* v. *Porter*, 10 Cush. 418. What constitutes a reasonable ground of suspicion justifying an arrest, is a question of law. *Hill* v. *Yates*, 2 Moore, 80; *Burns* v. *Erben*, 40 N. Y. 463. When, after a recovery for an unlawful imprisonment, the imprisonment is continued, it constitutes a fresh trespass for which another action may be maintained. *Leland* v. *Marsh*, 16 Mass. 389.

§ 2. **Who may be sued.** Where the agent of a tenant in common of land enters thereon to remove his principal's share of the crops, and is forcibly ejected therefrom by the co-tenant, an action may be maintained against the latter for an assault and battery. *Com.* v. *Rigney*, 4 Allen, 316. If a personal injury be inflicted on another by a servant in the execution of the duties assigned him by his master, the latter is holden. *Greenwood* v. *Seymore*, 4 Law Times, 835. Within the same rule, where a corporation gives an order to an employee to do an act which implies the use of personal violence to others, and the employee, in the execution of the order, goes beyond justifiable limits in the use of force, the corporation will be liable to an action of trespass therefor. *Eastern R. R. Co.* v. *Broom*, 6 Exch. 314; *Goff* v. *Great Northern R. R. Co.*, 3 El. & El. 672; L. J., 30 Q. B. 148; *Passenger R. R. Co.* v. *Young*, 21 Ohio, 518; 8 Am. Rep. 78; *Chicago, etc., R. R. Co.* v. *McCarthy*, 20 Ill. 385; *Jackson* v. *Second Av. R. R. Co.*, 47 N. Y. 274; 7 Am. Rep. 448; *Ramsden* v. *Boston, etc., R. R. Co.*, 104 Mass. 117; 6 Am. Rep. 200.

§ 3. **Joint trespassers.** Not only the active participants in an assault and battery are answerable for all the injury, but also those who are present encouraging the others. *Com.* v. *Hurley*, 99 Mass. 433; *Frantz* v. *Lenhart*, 56 Penn. St. 365; *Francis* v. *Leach*, 41 Vt. 675; *Little* v. *Tingle*, 26 Ind. 168; *State* v. *Rawles*, 65 N. C. 334. By-

standers may even incur liability by not interfering to prevent threatened violence, as in the case of a commander of a military company, who is liable for disorders committed by the soldiers under his command, which he knew of and did nothing to prevent, or to detect and punish. *Avery* v. *Bulkly*, 1 Root, 275. An action of trespass may be maintained against a married woman, or minor, who aids, abets, or counsels and procures an assault and battery, although it is committed when they are not personally present. *Sikes* v. *Johnson*, 16 Mass. 389. A person will not, however, be liable as a joint trespasser for an assault and battery committed in his absence, unless he did something directly causing the commission of the offense. *Bird* v. *Lynn*, 10 B. Monr. 422. The rule under consideration is equally applicable to cases of false imprisonment; and all concerned therein are liable, although they took no part in making the arrest, but supposed that it and the imprisonment were lawful. *Griffin* v. *Coleman*, 4 H. & N. 265.

When a number of persons commit an assault and battery, the aggrieved party may sue each separately, or make all of them defendants in a single action. *Sheldon* v. *Kibbe*, 3 Conn. 214. If it is impossible to serve some of the defendants with process, the plaintiff may discontinue as to them, and proceed to trial against the others. *McKenzie* v. *Hackstaff*, 2 E. D. Smith, 75. In an action against the wife for an assault and battery committed by her, the husband may be joined as a defendant, both being liable. *Anderson* v. *Hill*, 53 Barb. 238. But if the injury was inflicted by them jointly, he must be sued alone. *Sisco* v. *Cheeney*, Wright's R. 9. When an action for false imprisonment is brought against several, and a portion of the wrong was committed before one of the defendants had any thing to do with the transaction, that defendant must either be acquitted, or the evidence be restricted to what occurred after he became implicated. *Aaron* v. *Alexander*, 3 Camp. 36.

§ 4. **Motive or intent.** One who unintentionally inflicts personal injury upon another will not be liable, if he exercised the prudent care and diligence demanded by the circumstances. *Brown* v. *Kendall*, 6 Cush. 292; *Castle* v. *Duryea*, 4 Abb. Ct. App. 327; 2 Keyes, 169. See Vol. 1, pp. 160, 337. In cases of this nature the burden of proof is on the person aggrieved, to show that the aggressor intended the consequences of his act, or was in fault. *Alderson* v. *Waistell*, 1 Car. & K. 358. Evidence of unfriendly feeling on the part of the latter toward the former would be admissible to determine the character of the act. *Aulger* v. *Smith*, 34 Ill. 534; *Jewett* v. *Banning*, 21 N. Y. 27; *Klein* v. *Thompson*, 19 Ohio St. 569. For this purpose, what transpires before or after the occurrence charged, as well

as the language used by the defendant at the time, may be shown *Long* v. *Chubb*, 5 C. & P. 55; *Mills* v. *Carpenter*, 10 Ired. 298; *Devine* v. *Rand*, 38 Vt. 621; *Woodall* v. *McMillan*, 38 Ala. 622; *McDougall* v. *Maguire*, 35 Cal. 274; *Pulver* v. *Harris*, 61 Barb. 78; *Josselyn* v. *McAllister*, 25 Mich. 45; *Blake* v. *Damon*, 103 Mass. 199. On the other hand, the defendant may prove that he acted under justifiable provocation. *Dale* v. *Wood*, 7 Moore, 33; *Penn* v. *Ward*, 2 C. M. & R. 338; *Hazel* v. *Clark*, 3 Harring. 22.

§ 5. **Defense of person or property.** A person may lawfully defend himself against a wrongful aggression to an extent that shall make his defense effective, without regard to consequences. *State* v. *Hooker*, 17 Vt. 658. But the resistance must not exceed the requirements of self-protection. *Moriarty* v. *Brooks*, 6 C. & P. 684; *Curtis* v. *Carson*, 2 N. H. 539; *Shorter* v. *People*, 2 N. Y. 193; *Com.* v. *Clark*, 2 Metc. 23; *Rogers* v. *Waite*, 44 Me. 275; *State* v. *Davis*, 7 Jones, 52. If he have good reason to believe that his assailant is about to do him great bodily injury, endangering his life, he will be justified in killing him (*Morris* v. *Platt*, 32 Conn. 75; *Taylor* v. *Clendening*, 4 Kans. 524); and this right to repel force by force to the extent of taking the life of the aggressor includes the defense of one's habitation or property against a person who intends by violence or surprise to commit a felony therein. Foster's Cr. L. 259. One is not obliged to flee to avoid an assault (*Heady* v. *Wood*, 6 Ind. 82); and he may pursue and lay hold of his assailant to protect himself from further injury. *Paige* v. *Smith*, 13 Vt. 251. The law of self-defense includes the protection of others, as a wife, child, or servant, and even a stranger, when such protection is necessary to prevent a breach of the peace. *Mellen* v. *Thompson*, 32 Vt. 407; *Hill* v. *Rogers*, 2 Clarke, 67; *Obier* v. *Neal*, 1 Houston, 449. No liability attaches where a person, in rightfully defending himself from threatened danger, unintentionally injures a third person. *Scott* v. *Shepherd*, 2 W. Bla. 892; *Morris* v. *Platt*, 35 Conn. 75.

If B seizes A by the arm and swings him around violently and then lets him go, thus throwing him against C, who instantly pushes him away and against a hook which injures him, an action of trespass lies by A against B. *Ricker* v. *Freeman*, 50 N. H. 20; 9 Am. Rep. 267.

A man has a right at common law to resist by force an unlawful attempt to dispossess him of his property, real or personal, or of property of which, though not the owner, he has lawful possession, custody or control (*Gregory* v. *Hill*, 8 Term R. 299; *Alderson* v. *Waistell*, 1 Car. & K. 358; *Corey* v. *People*, 45 Barb. 262; *Goodwin* v. *Avery*, 26 Conn. 585); and his son or servant acting by his command has the same right. *Tribble* v. *Frame*, 7 J. J. Marsh. 599; *Blades* v. *Higgs*,

10 C. B. 713. But to justify an assault the interference must be actual, and not merely anticipated. *McAuley* v. *State*, 3 Greene (Iowa), 435. If the owner of goods is resisted in the attempt to take them from a trespasser who is about to carry them away, he may employ all the force necessary to overcome such resistance. *Baldwin* v. *Hayden*, 6 Conn. 453; *Gyre* v. *Culver*, 47 Barb. 592. Where an officer unlawfully enters a house, and seizes property therein, he may be resisted. *People* v. *Hubbard*, 24 Wend. 369. In order to throw the shield of the law over an officer, so as to make it improper to resist him, he must not only be a legal officer, but he must have a good and sufficient precept which he is attempting to execute, and he must be attempting to execute it in a legal way. An officer may lawfully be resisted when the warrant is insufficient from some defect; when it is not in the hands of a proper officer; when an attempt is being made to execute it out of the jurisdiction; when the wrong person is taken under it. *State* v. *Hooker*, 17 Vt. 658.

If a person who is not an officer, armed with legal process, forcibly enters the premises of another, he may be opposed with force, without being first requested to depart. *Tullay* v. *Reed*, 1 C. & P. 6; *Pitford* v. *Armstrong*, Wright, 94. Where, however, his entry is not made with violence, he must be told to leave before force can lawfully be used to put him out, and such a degree of force only must be employed as is necessary to accomplish the object. *Weaver* v. *Bush*, 8 Term R. 78; *Scribner* v. *Beach*, 4 Denio, 448. A resistance by the intruder to expel him will constitute an assault and battery. *Wheeler* v. *Whitney*, 9 C. & P. 262. On the other hand, if wanton injury be inflicted, even on a trespasser, he may maintain an action therefor. *Deane* v. *Clayton*, 7 Taunt. 489. A person who enters a house, office, or shop, by permission, may be requested by the owner to leave at any time, and, upon refusal to do so, may be ejected. *Timothy* v. *Simpson*, 6 C. & P. 500; *Pierce* v. *Hicks*, 34 Ga. 259; *Woodman* v. *Howell*, 45 Ill. 367; *State* v. *Woodward*, 50 N. H. 527. If, however, an individual goes to another's house with process, which he is authorized by law to serve, and the occupier of the house attempts to put him out before he has accomplished his purpose, he may lawfully resist such attempt. *Hager* v. *Danforth*, 20 Barb. 16. An innkeeper may lawfully expel from his premises a person who is creating disturbance, using whatever force is necessary, if he refuses to leave. *Howell* v. *Jackson*, 6 C. & P. 723; *Moriarty* v. *Brooks*, id. 684; *Webster* v. *Watts*, 11 Q. B. 311.

So, a religious society may eject a person who is disturbing public worship; the fact of disturbance and refusal to depart upon request being the only elements essential to a justification. *Ballard* v *Bond*,

1 Jur. 7; *McLain* v. *Matlock*, 7 Ind. 525; *Wall* v. *Lee*, 34 N. Y. 141. The license to enter a place of public amusement afforded by a ticket may be revoked, and if the purchaser of the ticket persists in entering when requested to leave, he may be forcibly removed. *Wood* v. *Leadbitter*, 13 M. & W. 838; *McCrea* v. *Marsh*, 12 Gray, 211. A railroad company may rightfully exclude from the train those who refuse to pay their fare, or to comply with the reasonable regulations of the company, or may eject them if they have entered. *Jencks* v. *Coleman*, 2 Sumner, 221; *Stephen* v. *Smith*, 29 Vt. 160; *McClure* v. *Phila., etc., R. R. Co.*, 34 Md. 532; 6 Am. Rep. 345; *Downs* v. *N. Y., etc., R. R. Co.*, 36 Conn. 287; 4 Am. Rep. 77; *Adwin* v. *N. Y., etc., R. R. Co.*, 60 Barb. 590; *Cheney* v. *B. & M. R. R. Co.*, 11 Metc. 121. But a person may lawfully repel an attempt to put him off of the train, when such attempt is attempted with hazard to his life, although he be liable to expulsion. *Sanford* v. *Eighth Av. R. R. Co.*, 23 N. Y. 343.

§ 6. **Acts under judicial authority or process.** When a magistrate has a general jurisdiction over the subject-matter of a complaint, which charges another with a criminal offense, and a warrant is issued upon which the party charged is arrested, the person who made the complaint is not liable as a trespasser, although the arrest was without cause, or the case was one of which the magistrate had no power to take cognizance. *West* v. *Smallwood*, 3 M. & W. 418; *Von Latham* v. *Libby*, 38 Barb. 339; *Barber* v. *Rollinson*, 1 C. & M. 330. So, a party who obtains and delivers to an officer valid process is not liable for a trespass committed by the latter in executing the process, unless it be shown that the officer acted under the party's orders. *Adams* v. *Freeman*, 9 Johns. 117; *Abbott* v. *Kimball*, 19 Vt. 551; *West* v. *Shockley*, 4 Harring. 287. But a judgment creditor who maliciously causes an execution to be levied for a larger sum than is due, and the debtor to be arrested, is a trespasser; and an action therefor may be brought before the debtor has been released from custody (*Gilding* v. *Eyre*, 10 C. B. [N. S.] 592; 9 W. R. 964; 31 L. J. C. P. 174); and a creditor who, having a legal right to invoke the power of imprisonment to enforce the collection of his judgment, employs such power to compel the debtor to pay another claim, will be deemed a trespasser *ab initio*. *Stoddard* v. *Bird*, Kirby, 65; *Breck* v. *Blanchard*, 22 N. H. 303. It is unlawful to employ criminal process to extort money, or even to compel the payment of a debt. Where a debtor is enticed by false pretenses from the State in which he resides into another State, in order to enable his creditor to bring an action against him, and on his arrival the suit is brought and his body attached, the whole proceeding is fraudulent and void, and the creditor liable to damages. *Pasley* v. *Free-*

*man*, 3 Term R. 51; *Shaw* v. *Spooner*, 9 N. H. 197; *Hill* v. *Goodrich*, 32 Conn. 588; 1 Wait's Pr. 662.

Although when a magistrate, who has jurisdiction, issues a warrant, or renders a judgment, under which a person is arrested and imprisoned, he cannot be made answerable in a civil action therefor, yet, the absence of jurisdiction will be fatal to any defense which rests on the assumption that he acted in a judicial capacity; and not only he, but all who advised or acted with him, or executed his process, will be trespassers. *Yates* v. *Lansing*, 9 Johns. 395; *Burnham* v. *Stevens*, 33 N. H. 247; *Wills* v. *Whittier*, 45 Me. 544; *Von Kettler* v. *Johnson*, 57 Ill. 109. If his jurisdiction be limited as to locality, it must appear on the face of the proceedings that they were had in such locality. *King* v. *Chilverscoton*, 8 Term R. 178. A magistrate may become a trespasser by erroneously issuing an execution, or a commitment, under which a party is arrested and imprisoned. *Sullivan* v. *Jones*, 2 Gray, 570; *Doggett* v. *Cook*, 11 Cush. 262; *La Roe* v. *Roeser*, 8 Mich. 537.

§ 7. **What process is, or is not, a protection.** As a general rule, all that is required in process to afford protection to the officer who serves it, is that it be regular on its face, and be issued by a court or magistrate having jurisdiction. *Wooster* v. *Parsons*, Kirby, 110; *Savacool* v. *Boughton*, 5 Wend. 170; *McMahan* v. *Green*, 34 Vt. 69; *Gorton* v. *Frizzell*, 20 Ill. 291; *Cameron* v. *Lightfoot*, 2 W. Bla. 1190; *Belk* v. *Broadbent*, 3 Term R. 185; *Nason* v. *Sewall*, Brayt. 119. It is sufficient for the officer's protection, that the process, though not authorized by the circumstances of the case, would have been authorized under other circumstances. *Hill* v. *Bateman*, 2 Strange, 710; *Warner* v. *Shed*, 10 Johns. 138. In an action of trespass for malicious arrest and imprisonment, it is a defense that the alleged wrong was committed by an officer in the course of legal proceedings, upon a sworn complaint charging that a crime had been committed, and that no more force was employed than was necessary. *Rhodes* v. *King*, 52 Ala. 272. Trespass will not lie for an act done under a legal process, legally issued by a court, or by an officer of competent jurisdiction. *Blalock* v. *Randall*, 76 Ill. 224. Case only will lie and that on the ground of malice and want of probable cause. Id. When an execution requires the officer, if there be no property subject to levy, to arrest the debtor, the officer will be protected in making the arrest, notwithstanding he is shown by the debtor a discharge under the insolvent law. *Wilmarth* v. *Burt*, 7 Metc. 257. An officer will be justified in arresting a privileged person, when the privilege is personal, the process regular on its face, and no want of jurisdiction apparent. *Wood* v. *Kinsman*, 5 Vt. 588; *State* v. *Hamilton*, 9 Mo. 794; *Com.* v. *Kennard*, 8 Pick. 133;

*Carle* v. *Delesdernier*, 13 Me. 363. But it is otherwise when the privilege is general. *Parsons* v. *Lloyd*, 3 Wils. 341; *Green* v. *Morse*, 5 Me. 291; *Mallory* v. *Merritt*, 17 Conn. 178. A jailer whose duty it is to receive and confine persons delivered to him on a regular warrant of commitment, will not be liable although the original arrest was tortious. *Oliet* v. *Bessey*, T. Jones, 214; *Smith* v. *Shaw*, 12 Johns. 257. Although an officer, who has arrested the wrong person, in consequence of false information given by such person, will not be liable, yet he will not be justified in detaining such person after he has been notified that he is not the party named in the warrant. *Davies* v. *Jenkins*, 11 M. & W. 755; *Dunston* v. *Paterson*, 2 C. B. (N. S.) 495. So, if an officer arrest the defendant in an execution after receiving notice from the plaintiff or his attorney, that the action has been withdrawn, it will constitute false imprisonment. *Dutcher* v. *Hinder*, 28 L. J. Exch. 28; *Withers* v. *Parker*, 4 H. & N. 524.

An officer may become a trespasser by some omission or misconduct subsequent to making an arrest, while those who aided him in the latter, by his command, will be excused. If, however, with knowledge that he was about to do an illegal act, they assisted him therein, though by his command, they will be trespassers. *Hooker* v. *Smith*, 19 Vt. 151. Where an officer, after making a legal arrest, detains the defendant subsequent to the determination of the proceedings, under an order which the court had not authority to make, it will be presumed that the officer knew of such want of authority, and he will be liable. *Watson* v. *Bodell*, 14 M. & W. 57.

§ 8. **Damages.** In the assessment of damages for an assault and battery, the jury are not restricted to any precise rule; but, having regard to the facts and circumstances of the case, they may allow for all the loss and injury sustained. *Gregory* v. *Cotterell*, 5 El. & Bl. 571; *Wadsworth* v. *Treat*, 43 Me. 163; *Cox* v. *Vanderkleed*, 21 Ind. 164. This may be not only for the physical pain endured, but, also, for the plaintiff's mental suffering. *Stockton* v. *Frey*, 4 Gill. 406; *Smith* v. *Overby*, 30 Ga. 241; *Holyoke* v. *Grand Trunk R. R.*, 48 N. H. 541; *Penn., etc., Canal Co.* v. *Graham*, 63 Penn. St. 290; 3 Am. Rep. 549; *Matteson* v. *N. Y. Cent. R. R. Co.*, 62 Barb. 264; *Smith* v. *Holcomb*, 99 Mass. 552. Deliberately spitting in the face of another, as in a public court room, entitles the injured party to punitive damages. *Alcorn* v. *Mitchell*, 63 Ill. 553. The amount of a physician's bill, and the expenses of litigation, including counsel fees, may be taken into consideration. *Moore* v. *Adam*, 2 Chit. 198; *O'Leary* v. *Rowan*, 31 Mo. 117; *Klein* v. *Thompson*, 19 Ohio St. 569; *New Orleans, etc., R. R. Co.* v. *Albritton*, 38 Miss. 242; *Noyes* v. *Ward*, 19 Conn.

250. So, likewise, the plaintiff will be entitled to recover for the necessary consequences of the injury, although such consequences do not result until after the commencement of the action. *Hodsoll* v. *Stallebrass*, 11 Ad. & E. 301; *Johnson* v. *Perry*, 2 Humph. 569; *Birchard* v. *Booth*, 4 Wis. 67. The natural consequences of the assault may be proved, without an averment in the declaration that any special or particular consequences resulted from the wrongful act. *Huxley* v. *Berg*, 1 Stark. 98; *Avery* v. *Ray*, 1 Mass. 12; *Hodges* v. *Nance*, 1 Swan, 57. But consequences which are purely speculative are not admissible in evidence, even when averred as special damage. *Barnes* v. *Martin*, 15 Wis. 240; *Brown* v. *Cummings*, 17 Allen, 507; *Hooper* v. *Haskell*, 56 Me. 251.

If the attack was wanton and unprovoked, exemplary damages may be given. *Causee* v. *Anders*, 4 Dev. & Batt. 246; *McNamara* v. *King*, 2 Gilm. 432; *Slater* v. *Sherman*, 5 Bush, 206; *Pike* v. *Dilling*, 48 Me. 539; *Lane* v. *Wilcox*, 55 Barb. 615; *Farwell* v. *Warren*, 51 Ill. 467; *Munter* v. *Bande*, 1 Mo. App. 484. To constitute legal malice, the defendant need not have entertained ill will toward the plaintiff; but malice may be inferred from an intention to tease or annoy. *Etchberry* v. *Levielle*, 2 Hilton, 40. Notwithstanding the defendant has been convicted and fined, in a criminal prosecution, the plaintiff may still recover exemplary damages in a civil action. *Phillips* v. *Kelly*, 29 Ala. 628; *Corwin* v. *Walton*, 18 Mo. 71; *Cook* v. *Ellis*, 6 Hill, 466; *Roberts* v. *Mason*, 10 Ohio St. 277; *Jefferson* v. *Adams*, 4 Harring. 321; *Wilson* v. *Middleton*, 2 Cal. 54; *Wolff* v. *Cohen*, 8 Rich. 144; *contra*: *Butler* v. *Mercer*, 14. Ind. 479; Vol. 1, p. 346; Vol. 2, p. 468. It is competent for the plaintiff to prove that the defendant is a person of large means. *Gore* v. *Chadwick*, 6 Dana, 477; *Pendleton* v. *Davis*, 1 Jones, 98; *Jarvis* v. *Manlove*, 5 Harring. 452

Although, at common-law, the husband has no title to damages for an injury to the person of his wife, yet when such damages are collected on a judgment, they belong to him. *Washburn* v. *Hale*, 10 Pick. 429. Under a statute giving to the wife the right to, and control over, her property, and permitting her to maintain an action in her own name for an injury to her person, damages for assault and battery on her are a part of her separate estate, and in respect to them she is as a *feme sole*. *Mann* v. *Marsh*, 35 Barb. 68. When an assault and battery is committed by the wife, damages therefor may be collected out of the property of both husband and wife. *Flanagan* v. *Tinen*, 53 Barb. 587; 37 How. 130. When the loss of service is the meritorious cause of action, as in case of an assault on a child or servant, the plaintiff can

only recover for the actual loss, which will include the expenses, if any, incurred in consequence of the illness of the party injured. *Edmondson* v. *Machell*, 2 Term R. 4; *Whitney* v. *Hitchcock*, 4 Denio, 461; *contra: Klingman* v. *Holmes*, 54 Mo. 304.

Circumstances in excuse which fall short of a justification are admissible in mitigation of damages, but not such as constitute a perfect defense. *Linford* v. *Lake*, 3 H. & N. 276; *Watson* v. *Christie*, 2 B. & P. 224. Highly provoking language on the part of the plaintiff, immediately previous to an assault and battery, may be proved by the defendant in mitigation of damages. *Stephens* v. *Myers*, 4 C. & P. 349; *Cushman* v. *Ryan*, 1 Story, 91; *Shorter* v. *People*, 2 N. Y. 193; *Thompson* v. *Mumma*, 21 Iowa, 65; *Donnelly* v. *Harris*, 41 Ill. 126; *Murray* v. *Boyne*, 42 Mo. 472; *Wilson* v. *Young*, 31 Wis. 574; *Prentiss* v. *Shaw*, 56 Me. 427. Where, therefore, the plaintiff proved previous threats made by the defendant, it was held that the latter, to rebut the claim of the plaintiff that the defendant was actuated by premeditated malice, might show that just previous to the assault the plaintiff accused him of theft, and his reply. *Bartram* v. *Stone*, 31 Conn. 159. So, it is competent for the defendant to prove, in mitigation of damages, that the plaintiff wrote and published a libel concerning him. *Fraser* v. *Berkeley*, 7 C. & P. 621. And the same is the case, as to abusive language or acts of the plaintiff previous to the assault, which were a part of a series of provocations continued down to the time of the renconter (*Stetlar* v. *Nellis*, 60 Barb. 524; 42 How. 163) but not misconduct of the plaintiff wholly disconnected with the act charged. *Avery* v. *Ray*, 1 Mass. 12; *Matthews* v. *Terry*, 10 Conn. 455; *Dole* v. *Erskine*, 37 N. H. 316; *Schlosser* v. *Fox*, 14 Ind. 365; *Thrall* v. *Knapp*, 17 Iowa, 468. Declarations of the plaintiff, relative to the defendant, are not admissible in mitigation of damages, unless they are shown to have been communicated to the defendant immediately before the assault. *Chambers* v. *Porter*, 5 Cold. (Tenn.) 273; *Gaither* v. *Blowers*, 11 Md. 536; *Castner* v. *Sliker*, 33 N. J. 95. Where it is proved that the defendant prevented the interference of a third person, evidence of the declarations of such third person at the time, tending to show that he was about to join in the fight, is admissible in mitigation of damages. *Watkins* v. *Gaston*, 17 Ala. 664.

False imprisonment, though committed without any wrongful intention, will entitle the party aggrieved to damages for whatever injury he has sustained, whether from loss of time, suffering in mind or body, or expense incurred in obtaining his discharge. *Josselyn* v. *McAllister*, 22 Mich. 300; *Parsons* v. *Harper*, 16 Gratt. 64; *Mason* v. *Barker*, 1 Car. & K. 100; *Bonesteel* v. *Bonesteel*, 30 Wis. 511. But exemplary

damages can only be recovered in case the act was committed with malice (*McCall* v. *McDowell*, 1 Abb. [U. S.] 212; *Reuck* v. *McGregor*, 32 N. J. 70); or insult (*Fellows* v. *Goodman*, 49 Mo. 62; *Bauer* v. *Clay*, 8 Kan. 580); or was followed by a false charge against the plaintiff of crime. *Warwick* v. *Foulkes*, 12 M. & W. 507. When the plaintiff, before bringing the action, himself fixes the measure of his damages, by accepting a given sum in full satisfaction, a verdict for a much larger amount will be set aside as excessive. *Price* v. *Severn*, 7 Bing. 316.

§ 9. **Judgment.** In an action for an assault and battery against several, as each defendant is liable for the whole injury, the damages cannot be severed, notwithstanding it be proved that the principal violence was committed by one of them. *Brown* v. *Allen*, 4 Esp. 158; *Walker* v. *Woolcott*, 8 Car. & P. 352; *Carney* v. *Reed*, 11 Ind. 417. If a verdict be rendered against one for a certain amount of damages, and against the others for a less amount, the plaintiff may discontinue as to the latter, and take judgment against the former (*Turner* v. *McCarthy*, 4 E. D. Smith, 247); or, he may demand judgment against all for the largest sum named in the verdict. *Sabin* v. *Long*, 1 Wils. 30; *Cunningham* v. *Dyer*, 2 Monr. 50; *Halsey* v. *Woodruff*, 9 Pick. 555; *Beal* v. *Finch*, 11 N. Y. 128.

A judgment which determines the question of possession between the same parties in another matter, relative to the same transaction, is conclusive as to which of them was entitled to possession at the time of an alleged assault and battery. *Bell* v. *Raymond*, 18 Conn. 91. Although a judgment, upon a trial of the merits between the same parties relative to an alleged trespass, until reversed, constitutes a defense to a second action brought for the same cause, yet a judgment against several for a joint trespass will not bar an action against one of them for a several trespass. *Davis* v. *Caswell*, 50 Me. 294.

# CHAPTER CXXVIII.

## TROVER.

### ARTICLE I.

#### OF TROVER IN GENERAL.

**Section 1. Definition and nature.** Trover is a special action on the case, in favor of any person who has a general or a special property in goods, against any person who wrongfully withholds them from his possession. It lies for the conversion or detention of any species of personal property, animate or inanimate, and, in very many instances, is a concurrent remedy with trespass and case. Indeed, in all instances where goods are *forcibly* taken and converted, trover as well as trespass is a proper remedy. Thus, if A forcibly takes B's horse and converts it to his own use, B may bring either trespass or trover thereon: but if A takes the horse and delivers it to C, who converts it, B can only maintain trover against C, because he did not forcibly take the horse from B. So, too, if A forcibly takes B's goods, and removes them to another place, but does not afterward exercise or claim to exercise any control or dominion over them, he is liable to B in trespass for his wrongful intermeddling with the goods, but trover will not lie against him because he has not *converted* them to his own use or assented to their conversion by another. *Falk* v. *Fletcher*, 18 C. B. (N. S.) 403; 34 L. J. C. P. 146. Indeed, the real distinction between trespass and trover was well illustrated in the old case of *Bushel* v. *Miller*, 1 Str. 128. In that case there was a hut upon the custom house quay, in which certain parties were permitted to put parcels, if the vessel upon which they were to be sent was not ready to receive them. The parties having the privilege of putting parcels in this hut, each had a special cupboard or box for that purpose, and the defendant had one. The plaintiff put goods into the hut in such a way that the defendant could not get at his chest without removing them. The defendant did remove the goods about a yard toward the door and left them there, and they were lost. In an action of trover for the same, the court held that no recovery could be had, because the defendant did not exercise, or claim to exercise, any dominion or control over the goods. ROLFE, B., in a lead-

ing case upon this topic, said: "Suppose I, seeing a horse in a ploughed field, thought it had strayed, and under that impression led it back to pasture, it is clear that an action of trespass would lie against me, but would any man say that this amounted to a conversion of the property to my own use?" Thus it will be seen that the distinction between trespass and trover consists in the fact whether there has been a conversion of the property, and that in all cases where property has been wrongfully taken *and converted* by the wrong-doer, the remedies are concurrent; but that, when there has been simply a wrongful taking and no conversion, trespass alone will lie for the injury, and that, where the taking was lawful, but was followed by a wrongful conversion, trover is the only remedy.

§ 2. **When the action will lie.** Trover is a proper remedy whenever a person has goods or property in his possession belonging to another, which he wrongfully detains from such owner's possession, or from the possession of a person who is entitled thereto. *Hoffman* v. *Carow*, 22 Wend. 285; *Pettes* v. *Marsh*, 15 Vt. 454; *Caldwell* v. *Cowan*, 9 Yerg. (Tenn.) 262; *Betts* v. *Mouser*, Wright (Ohio), 744; *Knapp* v. *Winchester*, 11 Vt. 351; *Fairbanks* v. *Phelps*, 22 Pick. 535; *Matthews* v. *Harsell*, 1 E. D. Smith (N. Y.), 393; *Freeman* v. *Underwood*, 66 Me. 229; *Clark* v. *Malloney*, 3 Harr. (Del.) 68. A wrongful conversion is the gist of the action (*Waring* v. *Penn. R. R. Co.*, 76 Penn. St. 491); and whenever that can be established, and the plaintiff maintains his right to the immediate possession of the property, the action will lie. *Abercrombie* v. *Bradford*, 16 Ala. 560; *Landon* v. *Emmons*, 97 Mass. 37; *Lamb* v. *Clark*, 30 Vt. 347; *Cook* v. *Patterson*, 35 Ala. 102; *Fulton* v. *Fulton*, 48 Barb. 581; *Burke* v. *Savage*, 13 Allen, 408. In all cases, it may be said, that trover will lie when property has been converted by another, wrongfully, and against the right of the plaintiff; and it is a matter of no consequence so far as the rights of the plaintiff are concerned, whether the defendant acted in good faith, under a supposition that he was the owner of the property, and that he had a right to convert it, or not. *If, in point of fact, he had no such right, as against the plaintiff*, he is amenable in this form of action for the damages. Honesty of purpose is no defense to the action. The fact that the defendant purchased the property under an honest belief that his vendor had a good title thereto, is of no avail, if, in fact, the title was in the plaintiff. *Morrill* v. *Moulton*, 40 Vt. 242; *Flanders* v. *Colby*, 18 N. H. 34; *Tallman* v. *Turck*, 26 Barb. 167; *Garrard* v. *Pittsburgh, etc., R. R. Co.*, 29 Penn. St. 154; *Crocker* v. *Gullifer*, 44 Me. 471. The rule is, that trover may be maintained against one

who converts another's property, although he came into the possession lawfully, and believed it to be his own (*Morrill* v. *Moulton*, 40 Vt. 242); and this is so, even though he shared the property, or its proceeds, with a third person under that understanding. *Johnson* v. *Powers*, 40 Vt. 611. Nor will the fact that the property was taken by mistake, operate to shield the defendant from liability. *Platt* v. *Tuttle*, 23 Conn. 233. Thus, in *Hobart* v. *Hackett*, 12 Me. 67, the plaintiff sold the defendant an ox on his (the plaintiff's) premises, and the defendant drove away the wrong ox through mistake. The court held that he was liable for the damages, and could not shield himself from liability upon the ground of an innocent mistake. See, also, *Caldwell* v. *Farrell*, 28 Ill. 438. The real question is, whether the plaintiff owns the property, or has a right to its immediate possession, and has been converted by the defendant. If so, no defense, which does not show that a title to the property, through or from the plaintiff, was acquired, will avail. *Motives* have no influence upon the result, but the whole matter turns upon the right of property on the one hand, and of conversion on the other. If the defendant sets up title in a third person, in order to render such person's title available to him, he must show some title or interest in himself derived from such person. *Hoffman* v. *Carow*, 22 Wend. 285; *Harker* v. *Dement*, 9 Gill (Md.), 7; *Lowermore* v. *Berry*, 19 Ala. 130. Mere possession of property by one, of another's property, affords no evidence that the person having the possession has power to sell it, and he who purchases, or intermeddles with it, must see to it, that he is protected by the authority of one who has power to sell. *Spraight* v. *Hawley*, 39 N. Y. (12 Tiff.) 441; *Dixon* v. *Caldwell*, 15 Ohio St. 412; *Taylor* v. *Pope*, 5 Cold. (Tenn.) 413; *Gilmore* v. *Newton*, 9 Allen, 171; *Cooper* v. *Newman*, 45 N. H. 337. The doctrine that a person may pursue and recover for his property in the hands of an innocent purchaser or bailee, is illustrated by a large number of cases. Thus, in *St. Louis, etc., R. R. Co.* v. *Kaulbrumer*, 59 Ill. 152, the plaintiff brought an action of trover against the defendants to recover the value of a lot of posts that had, without his consent, been taken by some contractors and put into a fence belonging to the defendants. The defendants had no knowledge of the wrongful taking of the posts, and had paid the contractors for them in good faith; but the court held, that they were liable to the plaintiff for their value, in trover. See, also, similar in principle, *Ogden* v. *Lucas*, 48 Ill. 492; *Miller* v. *Thompson*, 60 Me. 322; *Duncan* v. *Stone*, 45 Vt. 118; *Clark* v. *Wells*, 45 id. 4; 12 Am. Rep. 187. In *Miller* v. *Thompson*, 60 Me. 322, one of the defendants bid off a vessel which was sold by the master. The plaintiff, who was a part owner, had not

been notified of the disaster, in consequence of which the sale was void. The defendant bid off the vessel in good faith and in ignorance of the fact that any legal steps had been neglected. The court held that the defendants were liable in trover for the plaintiff's interest in the vessel. In a Vermont case (*Clark* v. *Wells*, 45 Vt. 4), the plaintiff, at the instance of a bailee of a stage wagon, put new wheels and axles into it, taking the bailee's note therefor, but reserving, by agreement, a lien upon the wheels and axles, until they were paid for. The owner, who was ignorant of the existence of this lien, sold the wagon to the defendant, who was also ignorant of the facts. The note not having been paid at maturity, the plaintiff brought trover against the defendant for the wheels and axles, and it was held that he was entitled to recover. See, also, to the same effect, *Seago* v. *Pomeroy*, 46 Ga. 227; *Carter* v. *Kingman*, 103 Mass. 517. An auctioneer is liable in trover for property sold by him at public auction, that was stolen, even though he acted innocently. *Hoffman* v. *Carow*, 22 Wend. 285.

A person who receives the property of another for a certain purpose is liable in trover if he applies it to another or different purpose. Thus, if a person hires a horse to go to a place agreed upon, and drives it beyond that place, or to another place, it is a conversion of the property and he is liable in trover for any diminution in the value of the property, or for any injury thereto, even though the injury results from an insufficiency in the harness, or from some infirmity in the horse itself. *Perham* v. *Coney*, 117 Mass. 102; *Fish* v. *Ferris*, 5 Duer, 49; *Harvey* v. *Epps*, 12 Gratt. 153; *Woodman* v. *Hubbard*, 25 N. H. 67; *Lucas* v. *Trumbull*, 15 Gray, 306; *Moseley* v. *Wilkinson*, 24 Ala. 411. This principle was well illustrated in *Richardson* v. *Dingle*, 11 Rich. (S. C.) 405. In that case the defendant hired the plaintiff's slave to work on his farm. He put him at work upon a steamboat, and while so engaged, he was drowned, and the court held that the plaintiff could maintain trover for the slave. The rule may be said to be, in all cases, that, when property is lent or placed in the hands of a third person for a special purpose, trover will lie therefor, if it is applied to another or different purpose (*Norton* v. *Kidder*, 54 Me. 189; *Farrand* v. *Hurlburt*, 7 Minn. 477); as, where money is deposited in a bank with instructions to apply it in the payment of a particular note, or for the payment of a particular check, already or thereafter to be drawn, if it is applied to the payment of any other note or check without the consent of the depositor, he may maintain trover against the bank for the money. *Norton* v. *Kidder*, 54 Me. 187. So where money or other property is left or deposited with a person for a special purpose or object, as for collateral security,

erty, as, where A. borrowed a wagon of B. to use on his place, and he sent it heavily loaded to another place, whereby the wagon was damaged, he was held guilty of a conversion. *Hart* v. *Skinner*, 16 Vt. 138; *Manwell* v. *Briggs*, 17 id. 176; *Neal* v. *Hanson*, 60 Me. 84; *Glaze* v. *McMillan*, 7 Port (Ala.) 279. And a use of the property for a purpose other than that for which it is let is such an abuse of it, as renders the bailee liable. *Harvey* v. *Epes*, 12 Gratt. 153. So it lies for property which the defendant holds under a void contract. Thus, where the owner of stock pledged it as collateral security for the payment of a usurious loan, it was held that he was entitled, after a demand therefor, and a refusal by the defendant to deliver them to him, to recover their value, in trover, even though under the contract the defendant was authorized to, and actually had hypothecated them before a demand was made. *Cousland* v. *Davis*, 4 Bosw. 619. So it lies for property sold conditionally, after a breach of the condition, as, where property is sold under an agreement that the title shall remain in the vendor until the price is paid. Thus, the plaintiff delivered a watch to a person under a conditional bargain that, if he kept it, he should pay an agreed price. The vendee died without having paid the price, and his wife, as administratrix of the estate, included it in the inventory of his estate, and received the watch as a part of her allowance under a decree of the court, and sold it to the defendant. It was held that the plaintiff had not lost his property in the watch, and that the defendant was liable in trover for the value of the watch. *Jillson* v. *Wilbur*, 41 N. H. 106. See, also, *Clark* v. *Wells*, 45 Vt. 4; S. C., 12 Am. Rep. 187; *Duncan* v. *Stone*, 45 Vt. 118; *Rawson* v. *Tuel*, 47 Me. 506. But if property so situated is sold by the vendee with the assent of the vendor, express or implied, trover will not lie. Thus, the plaintiff sold his interest in the business of manufacturing slate mantles and billiard stock, to the defendants, on condition that the property should not pass until paid for, or until the assumed liabilities of the firm should be paid up. The defendant, with the implied assent of the plaintiff, sold some of the property, without then intending to appropriate the avails contrary to the agreement, but afterward *did* so convert them. It was held that trover would not lie for the goods so sold. *Kellogg* v. *Fox*, 45 Vt. 348. When property upon which a lien exists is attached as the property of the vendee before the lien is fully extinguished, both the attaching creditor and the officer making the attachment, or either of them, are liable in this form of action. *McFarland* v. *Farmer*, 42 N. H. 386; *Rawson* v. *Tuel*, 47 Me. 506; *Duncan* v. *Stone*, 45 Vt. 118. Thus, in the case last cited, the plaintiff sold a person a wagon, under an agreement that it should remain his

(the plaintiff's) property until paid for. The defendant, as constable, attached the wagon on a writ in favor of a creditor of the vendee, and three days afterward it was stolen from him. One-half, only, of the purchase-money had been paid at the time of the attachment. The court held that the defendant was liable in this form of action for the value of the wagon at the time when the attachment was made. *Walker* v. *Clyde*, 10 C. B. (N. S.) 38; *Fisk* v. *Ewen*, 46 N. H. 173; *Hicks* v. *Cleaveland*, 39 Barb. 573. So where property is sold, and a lien is reserved thereon, or a mortgage executed thereon to secure the purchase-money (in those States where chattel mortgages are, by statute, given validity), the lienor or mortgagee may, after condition broken, maintain this action against any person who comes into the possession of the property, whether under a purchase from the vendee, or otherwise. *Chamberlain* v. *Clemence*, 8 Gray, 389. Trover lies by the owner of land against persons who, as trespassers, picked wild berries thereon and sold them, and there is no need of making any demand before action. *Freeman* v. *Underwood*, 66 Me. 229. And the action lies against the purchasers of the berries without any previous demand. Id.

§ 3. **When the action will not lie.** The mere fact that a person is in the possession of personal property belonging to another, which he refuses to deliver up upon demand, *prima facie* lays the foundation for a recovery, but this may be overcome by proof showing that the possession is lawful, or that there has in fact been no conversion of the property by the defendant. The defendant may show that he is a lessee of the property, under the plaintiff or those under whom he claims, for a term not then expired (*Hickok* v. *Buck*, 22 Vt. 149); or that he holds under one who has a life estate in the chattel claimed by the plaintiff as one entitled to it in remainder (*Nations* v. *Hawkins' Adm'rs*, 11 Ala. 859); or that he is a bailee of the goods for a specific purpose, which has not been consummated (*Benoir* v. *Paquin*, 40 Vt. 199); or that he has a lien upon the property which has not been satisfied (*Scarfe* v. *Morgan*, 4 M. & W. 281; *White* v. *Spettigue*, 13 id. 608); or that he has never intermeddled with the property, or has not refused to allow the plaintiff to take possession of it. *Durgin* v. *Gage*, 40 N. H. 302. Trover will not lie against a person who has received property from another by way of pledge, or for any specific purpose, if the pledgor or bailor had no title thereto; and it is always a good defense, in such cases, that the pledgee or bailee has delivered the property to the true owner (*Cheesman* v. *Exall*, 6 Exch. 341); or that he holds it for, and by the directions of another person, who is the real owner of the property. *Ogle* v. *Atkinson*, 5 Taunt. 759; *Wilson* v. *Anderton*, 1 B. & Ad. 450. There is not, either in the ordinary

contract of a pledge or bailment, an implied undertaking that the property shall be returned to the pledgor or bailor *in any event*, but only an implied undertaking that it shall be so returned, provided it be not the property of another (*Cheesman* v. *Exall*, 6 Exch. 341); consequently, a delivery of the property to (*King* v. *Richards*, 6 Whart. [Penn.] 418; *Shelbury* v. *Scotsford*, Yelv. 23), or a holding of it by the direction, or at the request of the true owner, is always a good defense to an action by the pledgor or bailor. *Ogle* v. *Atkinson*, 5 Taunt. 759. Trover will not lie where goods are taken by an armed force without any negligence or complicity on the part of the bailee. *Abraham* v. *Nunn*, 42 Ala. 51. Of course, when a person, other than the one from whom it is received, claims the property, the person having it in his possession acts at his peril, either in delivering or refusing to deliver it to either, and is liable in trover therefor if he delivers it to the wrong person. Generally, title in a third person cannot be set up as a defense by a bailee or pledgee of property, unless he can in some way connect himself with such third person's title. *Rogers* v. *Arnold*, 12 Wend. 30; *Webb* v. *Fox*, 7 T. R. 391. But when the plaintiff originally obtained the property by force or fraud, or is seeking to recover it in fraud of the owner, the defendant may set up the owner's title in defense, without authority from him. *Laclouch* v. *Towle*, 3 Esp. 114.

Trover cannot be maintained against a person for a mere wrongful asportation of property, unless the taking or detention is with intent to convert it to the taker's own use, or that of some third person, *unless the act done has the effect of destroying, or changing the quality or character of the property.* It is not every wrongful taking of property that will amount to a conversion, and the statements in some of the old cases and text-books, that trover will lie whenever trespass will, has long since been exploded. In order to maintain trover, where there has been a wrongful taking, *it must have been with the intention of depriving the owner of his dominion over it, or must at least have that effect.* *Cooper* v. *Chitty*, 1 W. Bla. 65; *Garland* v. *Carlisle*, 2 C. & M. 31. In illustration of this the remarks of Buller, J., in the case of *Syeds* v. *Hay*, 4 T. R. 260, are in point. In that case Buller, J., said, "If a person takes my horse to ride, and leaves him at an inn, that is a conversion; for, though I may have the horse on sending for him and paying for his keep, yet, it brings a charge on me." In this case the effect is to deprive the owner of his dominion over the property. The taking must be followed by the exercise of some dominion over the property, to the exclusion of the owner. That a simple taking will not support the action is well illustrated by *Fouldes* v. *Willoughby*, 8 M. & W. 540. In that case, the defend-

ant was the manager of a ferry, and the plaintiff embarked on board with some horses, for the carriage of which he had paid the usual fare. He behaved improperly on board the boat, and the defendant told him to leave the boat, which the plaintiff refused to do. The defendant then took the horses from the plaintiff and sent them ashore, and they were taken to an inn kept by the defendant's brother. The following day the plaintiff sent for the horses, but the innkeeper declined to give them up until the charge for their keep was paid. The plaintiff declined to pay, and the horses were sold for the expenses, and trover was brought against the defendant to recover their value. The defense was that, as the plaintiff misconducted himself on the boat, the horses were put on shore in order to get rid of the plaintiff by inducing him to follow them. The court held that no recovery could be had in trover, as there was no conversion of the property by the defendant.

This rule is well illustrated by a recent American case (*Tucker* v. *Housatonic R. R. Co.*, 39 Conn. 447), where the plaintiffs forwarded some oats over the defendant's railroad in a sealed car, which was not to be opened until it reached its place of destination. The defendants, while the goods were in transit, for its own convenience, opened the car, and transferred the oats to another car, and upon their arrival, for this reason, the plaintiff refused to receive the oats and brought an action of trover against the defendant therefor. The court held that the action would not lie. FOSTER, J., very pertinently saying, "If the arrangement between the parties was such that the plaintiff was entitled to have his oats go through in the blue car * * a change of the property from one car to another, for the convenience of the defendants, would not be a conversion of the property, and would not render them liable in trover. *If the same oats with no loss in quantity, and no injury to the quality, were then forwarded and delivered at the place of destination*, surely the action of trover would not lie."

Thus it will be seen that trover will not lie for a mere trespass to property, but only when the trespass is followed by a conversion by the person sought to be charged, or by a destruction of the property, total or partial.

Trover does not lie in favor of a principal against his agent for property sold by him at a less price than that at which he was directed to sell it (*Moore* v. *McKibbin*, 33 Barb. 246); nor against a bailee for property injured or destrored by his negligence (*Lockwood* v. *Bull*, 1 Cow. 322; *Hawkins* v. *Hoffman*, 6 Hill, 586); but the rule is otherwise if he willfully or purposely destroys it. See *Packard* v. *Getman*, 4 Wend. 613; *Hawkins* v. *Hoffman*, 6 Hill, 586; *Simmons* v. *Sikes*, 2 Ired. 98; *Evarts* v. *Kerr*, 1 Rice (S. C.), 204. Trover lies for per-

sonal property only; therefore it does not lie for any thing annexed to the freehold so as to form a part thereof (*Colegrove* v. *Dios Santas*, 2 B. & C. 78; *Woodruff Iron Works* v. *Adams*, 37 Conn. 233); as for standing trees or grass growing, or crops unharvested, or ores or minerals in the earth, or machinery permanently annexed to the freehold. But, after they are severed, the rule is otherwise. *Sampson* v. *Hammond*, 4 Cal. 184; *Whidden* v. *Seelye*, 40 Me. 247; *Branch* v. *Morrison*, 5 Jones (N. C.), 16; 6 id. 16; *Mooers* v. *Wait*, 3 Wend. 104. It will not lie for the depasturing of growing crops by another's cattle, even though the owner turned them into the lots where such crops were growing. *Smith* v. *Archer*, 53 Ill. 241. Trover does not lie to recover property purchased and in the possession of the vendor, until all the conditions precedent have been complied with by the vendee (*Chinery* v. *Veall*, 5 N. H. 288; *Woodcock* v. *Farrell*, 1 Metc. [Ky.] 437), for although he acquires the right of property by purchase, he does not acquire the right of possession until all conditions precedent have been complied with, and in order to maintain trover an immediate right to the possession of the property *in presenti* must exist (*Ayres* v. *French*, 41 Conn. 142, 150; *Bloxam* v. *Sanders*, 4 B. & C. 941; 7 D. & R. 396); and it has been held that even where goods are sold upon credit, but not delivered, trover cannot be maintained for their non-delivery until the price is paid, as in such cases both the right of property and of possession must concur. *Bloxam* v. *Morley*, 2 D. & R. 407; *Milgate* v. *Kebble*, 3 M. & G. 100; *Wilmhurst* v. *Bawker*, 5 Bing. (N. S.) 541. But the rule is otherwise if the property has been delivered to the purchaser, or, if he left it with the vendee, who consented to keep it for him as bailee. In the latter case, trover lies upon a refusal of the vendee to deliver it, even though the price has not been paid. *Chinery* v. *Viall*, 5 H. & N. 288. Trover will not lie for an article to be delivered under an executory contract, although paid for. *Mucklow* v. *Mangles*, 1 Taunt. 318; *Sutton* v. *Campbell*, 2 N. Y. (T. & C.) 595; *Andrews* v. *Durant*, 1 Kern. 35; *People, etc.*, v. *Com. of Taxes*, 58 N. Y. (13 Sick.) 242. And under this rule the buyer of an article to be made for him, but which has not been delivered, cannot maintain trover against the vendor therefor, even though he has paid for it in advance. Id. Nor does it lie in favor of the purchaser of goods which are in bulk or intermingled with other goods of the same kind belonging to the seller, unless there has been a separation of the specific part sold (*White* v. *Wilks*, 5 Taunt. 176; *Austen* v. *Craven*, 4 id. 644; *Bruce* v. *Wait*, 3 M. & W. 15); unless there has been a delivery of the property sold such as puts it practically under the vendee's control (*Whitehouse* v. *Frost*, 12 East, 614; *Simmons* v. *Swift*, 5 B. & C. 857; *Woodley*

v. *Brown*, 1 C. & P. 593); or under the control of some person acting as his agent. *Payne* v. *Brander*, 2 Stark. 568; *Woodley* v. *Brown*, 1 C. & P. 593. Trover will not lie in favor of a landlord, for goods which he has distrained, for the distrainer neither gains a general nor a special property, nor even the possession, in the cattle or things distrained; he cannot maintain trover or trespass, for they are in the custody of the law by the act of the distrainer and not by the act of the party distrained upon (*Whitley* v. *Roberts*, 1 McClel. & Y. 107, 118); nor in favor of one tenant in common against his co-tenant, for the common property, possession of which he insists upon retaining against his co-tenant, unless he has so disposed of it as to render it impossible that the plaintiff should ever take it (*Fennings* v. *Grenville*, 1 Taunt. 241); nor against a common carrier for goods lost by him. *Kirkman* v. *Hargreaves*, 1 Selw. (N. P.) 364. But it will lie where he delivers goods to the wrong person through mistake. *Devereux* v. *Barcley*, 2 B. & Ald. 702.

Trover does not lie against an involuntary bailee of goods who does not assert or claim to exercise any control or dominion over the goods except to hold them for the true owner, because he refuses to deliver them on demand, if he puts no obstacles in the way of the owner's taking them. *Hawkes* v. *Dunn*, 1 Cr. & J. 518, 527. Where the plaintiff's sheep break out of a lot where they are grazing and mingle with a flock of sheep of the defendant which he is driving along the highway and without any fault on his part, other than to allow them to go along the highway with his flock to his own premises where they could be separated, and on arriving there, such sheep are separated and turned into the highway and driven toward the place where they mingled with the defendant's flock; this is not a conversion of the defendant's sheep. *Van Valkenburgh* v. *Thayer*, 57 Barb. 196. So, it has been held that, where a person upon entering into the possession of premises found timber thereon which had been deposited there by the consent of a previous occupant, he could not be made chargeable in trover, simply because, upon demand for the timber, he required proof that it belonged to the plaintiff, it not appearing that he had ever intermeddled with the timber. *Green* v. *Dunn*, 3 Camp. 215, *n*. Trover will not lie against the finder of goods, who refuses to deliver them up until he is satisfied that the person demanding them is the true owner, provided he keeps them no longer than is necessary to make due inquiry. *Isack* v. *Clarke*, 1 Roll. 130; *Yale* v. *Saunders*, 16 Vt. 243; *Watts* v. *Porter*, 2 Mas. (C. C.) 77; *Robinson* v. *Burleigh*, 5 N. H. 225; *Beckley* v. *Howard*, 2 Brev. (S. C.) 94. It does not lie for property in the lawful custody of an officer of

the court (*Green* v. *Mead*, 18 N. H. 505); nor in the hands of an individual who has *any* right to the possession thereof when the action was brought (*Thompson* v. *Rose*, 16 Conn. 71; *Clark* v. *Draper*, 19 N. H. 419; *Clapp* v. *Glidden*, 39 Me. 448); because, unless the plaintiff has a right to the immediate possession of the property when the action was brought, he cannot recover (*Clark* v. *Draper*, 19 N. H. 419), and if any thing remains to be done, to entitle the plaintiff to have the property, he must do it before demand or suit. Thus where the defendant received a yoke of oxen of the plaintiff for the purpose of enabling him to do certain work, which he had contracted to do for the plaintiff, under a condition that, when the work was completed, the plaintiff might, if he so elected, have the oxen back by paying the defendant for what he had done toward the work, and on completion of the work, and on settling therefor, the oxen, with other property, were to be turned in in payment for the work; it was held that, before the plaintiff could maintain trover for the oxen, he was bound to pay the defendant for the work done, although the defendant sold the oxen before the job was completed. *Walker* v. *McNaughton*, 16 Vt. 388. This action cannot be maintained by an executor or administrator for property which, although appraised as the property of the estate, is in the possession of one who claims it adversely, unless the property has previously been in his possession as representative of the estate (*Hill* v. *Beall*, 41 Ga. 607); nor can it be maintained by one as trustee, when the legal title is in another (*Laspeyre* v. *McFarland*, 2 Taylor, 187); nor by one trespasser or wrong-doer against another. *Turley* v. *Tucker*, 6 Mo. 583; *Coffin* v. *Anderson*, 4 Blackf. 395.

§ 4. **Who liable to the action.** Every person who aids or assists in the conversion of property, whether with knowledge of the facts, or in ignorance thereof, is responsible to the owner for all the damages sustained by him (*Stephens* v. *Elwall*, 4 Maule & S. 259, 261; *Parker* v. *Godin*, 2 Str. 813; *Yost* v. *Stout*, 4 Coldw. [Tenn.] 205); although it was done by the direction of one, whose commands he was bound to obey; as a servant, who takes property at the command of his master (*Gage* v. *Whittier*, 17 N. H. 312; *Kimball* v. *Billings*, 45 Me. 147); or a soldier, who takes property by the command of his superior officer (*Yost* v. *Stout*, 4 Coldw. [Tenn.] 205); or a master, whose servant took the property of another by his command, or under his authority, express or implied, as, a carrier who directs his servants to retain the goods of a consignee (*Schuster* v. *McKellar*, 7 El. & Bl. 704; *Ewbank* v. *Nutting*, 7 C. B. 797, 808; *Jones* v. *Hart*, 2 Salk. 441), or whose servants, acting within the scope of their duty, deliver goods to the wrong person. *Ewbank* v. *Nutting*, 7 C. B. 797, 808. A servant

may be charged in trover for goods taken by him for the benefit of his master, whether by his direction or not. *Stephens* v. *Elwall*, 4 Maule & S. 259; *Perkins* v. *Smith*, 1 Wils. 328; *Greenway* v. *Fisher*, 1 C. & P. 190. But if his refusal to deliver property on demand is predicated upon a reasonable ground, he cannot be charged with a conversion as, if he refuses to deliver property that the master has repaired, until the repairs are paid for (*Fairman* v. *Grimble*, 2 C. & P. 266), or until he has had an opportunity to ascertain the master's wishes in the matter (*Alexander* v. *Southey*, 5 B. & Ald. 247), or if in the line of his duty he ships goods that have been pledged to the master. *Greenway* v. *Fisher*, 1 Carr. & P. 190. So it lies in favor of one part owner of a vessel against another part owner who sends the vessel to sea without his consent, whereby the vessel is lost (*Lowthorp* v. *Smith*, 1 Hayw. 255), or against a part owner of a chattel, who sells or destroys it, or who actually converts it to his own use so that his co-owner cannot have his portion of the property (*Turner* v. *Waldo*, 40 Vt. 51; *Williams* v. *Chadborne*, 6 Cal. 559; *White* v. *Brooks*, 43 N. H. 402; *Brightman* v. *Eddy*, 97 Mass. 478; *Dyckman* v. *Valiente*, 42 N. Y. 549; *Green* v. *Edick*, 66 Barb. 564; *Bell* v. *Layman*, 1 Monr. [Ky.] 30; *Weld* v. *Oliver*, 21 Pick. 559; *Ripley* v. *Davis*, 15 Mich. 78), but not, because he has *attempted* to sell the property (*Estey* v. *Boardman*, 61 Me. 595), nor, so long as he retains the property in his possession (*Cole* v. *Terry*, 2 Dev. & B. 252; *Weld* v. *Oliver*, 21 Pick. 559; *Wilson* v. *Reed*, 3 Johns. 175), nor for a mere sale of his interest in the property. *St. John* v. *Standring*, 2 Johns. 468. A sheriff, constable, customs officer, or other officer acting under legal process, however valid, or regular on its face, is liable in trover for the seizure of property thereon that does not belong to the person as whose property it was seized. *Duncan* v. *Stone*, 45 Vt. 118; *Fiedler* v. *Maxwell*, 2 Blatchf. (C. C.) 552. So it lies against an executor or administrator for property converted by the intestate in his life-time (*Decrow* v. *Mone's*, 1 Hayw. 21; *Avery* v. *Moore*, id. 362), so, against a bailee who has received property for one purpose, and applied it to another, the rule being that, if one who is lawfully in the possession of the property of another misuses it, or applies it to another use, such act amounts to a conversion. *Ripley* v. *Dolbier*, 18 Me. 382; *Harvey* v. *Epes*, 12 Gratt. 153. So it lies against a postmaster for refusing to deliver a letter (*Teal* v. *Felton*, 12 How. [U. S.] 284), so against one who takes the property by mistake (*Platt* v. *Tuttle*, 23 Conn. 233), or one who purchased it in good faith, of one whom he believed to be the owner. *Morrill* v. *Moulton*, 40 Vt. 242; *Tallman* v. *Turck*, 26 Barb. 167; *Garrard* v. *Pittsburgh, etc., R. R. Co.*, 29 Penn. St. 154. So it

lies against a carrier or other bailee for a refusal to deliver goods to the true owner, on demand (*Rooks* v. *Midland Railway Co.*, 16 Jur. 10, 69), and indeed, against any person who converts the goods of another wrongfully, under whatever pretense or authority. *Morrill* v. *Moulton*, 40 Vt. 242; *Flanders* v. *Colby*, 28 N. H. 34; *Yost* v. *Stout*, 4 Cold. (Tenn.) 205; *Teal* v. *Felton*, 12 How. (U. S.) 284; *Platt* v. *Tuttle*, 23 Conn. 233; *Harvey* v. *Epps*, 12 Gratt. 153; *Mead* v. *Thompson*, 78 Ill. 62; *Dudley* v. *Abner*, 52 Ala. 572; *Perham* v. *Carey*, 117 Mass. 102; *Woodis* v. *Jordan*, 62 Me. 490; *Nelson* v. *Beck*, 54 Ala. 329; *Indianapolis, etc., R. R. Co.* v. *Herndon*, 81 Ill. 143; *Smith* v. *Colby*, 67 Me. 169.

§ 5. **Who not liable to the action.** No person is chargeable in trover, for property in his possession belonging to another, unless he holds it wrongfully, and against the right of the owner. In order to maintain the action, the plaintiff must show that the defendant, not only has the property in his possession, but, also, that he has wrongfully converted it. See *post*, p. 163, Art. 2. Therefore, it follows that, whenever a person has a justifiable cause for withholding the property, the action will not lie. Thus, it will not lie against an officer who has seized the goods under a valid legal process against the owner (*Jenner* v. *Joliffe*, 9 Johns. 381; *Johnson* v. *Williams*, 48 Vt. 565); as upon a search warrant (*Pettigru* v. *Saunders*, 2 Bailey [S. C.], 549); upon a warrant of seizure under a liquor law (*Johnson* v. *Perkins*, 48 Vt. 572); or upon a writ of attachment or execution. *Jenner* v. *Joliffe*, 9 Johns. 381. But it does lie, if the officer wrongfully converts the property, or if the process is invalid, or he sells it otherwise than as provided by law. *Wright* v. *Spencer*, 1 Stew. (Ala.) 576. It seems, however, that the attaching or execution creditor although he directs the taking of the property, and points it out to the officer, is not liable *in trover*, unless he has the actual custody of the property. The reason for this is, that the property is held by the officer, not as agent for the creditor, but as an officer and while in his hands, it is in the custody of the law. *Adams* v. *Abbott*, 2 Vt. 383; *contra*, see *Libby* v. *Soule*, 13 Me. 310. *Ante*, p. 139. And the officer is responsible for its safe and proper keeping. A third person who has consented to the sale of his property by another upon certain conditions, cannot maintain trover against the vendee therefor, even though, after procuring the property, he refuses to perform his agreement. *Powell* v. *Powell*, 6 Sup. Ct. (T. & C.) N. Y. 51; 3 Hun, 413. But when the parties labor under a mutual mistake as to the terms of sale, and the vendor has delivered the property, he may, upon putting or offering to put the vendee *in statu quo*, maintain trover for the property sold. *Tripp* v. *Pulver*, 5 Sup. Ct. T. & C. (N. Y.) 30; S. C., 2

Hun, 511; and the same is the rule when the vendee obtained the goods by fraud. *Ayres* v. *French*, 41 Conn. 142, 153; *Dow* v. *Sanborn*, 3 Allen, 181; *Hall* v. *Naylor*, 18 N. Y. (4 Smith) 588. Trover will not lie against an innocent purchaser of goods, from one who acquired the property by purchase, however fraudulently. *Williamson* v. *Russel*, 39 Conn. 406; *Brown* v. *Pierce*, 97 Mass. 46, 48; *Cook* v. *Gilmartin*, 34 N. H. 556. But the rule is otherwise where the vendor had *no* title to the goods, but was a naked wrong-doer. *Hoffman* v. *Carow*, 22 Wend. 285; *Morrill* v. *Moulton*, 40 Vt. 242; *Tallman* v. *Turck*, 26 Barb. 167. Therefore, an auctioneer (*Hoffman* v. *Carow*, 22 Wend. 285), or any individual who *innocently* sells stolen goods, is liable in trover therefor to the owner. *Courtis* v. *Cane*, 32 Vt. 232. The distinction is, that, in the case of a fraudulent purchaser, a title, although defeasible, is obtained, while in the case of a mere trespasser, bailee, etc., no title whatever exists, consequently he can give none. *Williamson* v. *Russell*, 39 Conn. 406. It was formerly the rule, particularly in England, that before trover could be maintained for stolen goods, the thief must first be prosecuted, or steps to that end taken; but, whatever may formerly have been the rule, it is now held that trover may be brought against a third person having the goods, whether the thief has been prosecuted or not. *White* v. *Spettigue*, 13 M. & W. 603. See *post*, pp. 203, 204, § 19.

Trover does not lie against an agent for selling goods of his principal for a price less than that directed (*Moore* v. *McKibbin*, 33 Barb. 246); nor against a person with whom goods are deposited for sale at a fixed price, though he sells them for less. *Sarjeant* v. *Blunt*, 16 Johns. 74. But if he sells the property and takes a note payable to himself, and refuses to deliver it to the principal, he is liable in trover for the note, although he had authority to take a note in payment (*McNear* v. *Atwood*, 17 Me. 434); and, if an agent sells goods to pay his own debt, and the vendee is aware that he holds the goods as agent, both the agent and the vendee are liable in trover. *Herron* v. *Hughes*, 25 Cal. 555. If one, without authority, sells the plaintiff's chattel to the defendant, who receives in payment a bank check which he indorses and gives to the plaintiff in payment of a debt he owes him, and the plaintiff, in ignorance of the sale, collects the check and applies the proceeds to the payment of the debt; these acts are not a ratification of such sale. *Thacher* v. *Pray*, 113 Mass. 291; 18 Am. Rep. 480.

Trover does not lie against a mortgagee of chattels who has never taken possession under his mortgage. *The Matteawan Co.* v. *Bentley*, 13 Barb. 641. It does not lie against a *bona fide* holder, for value, of a note, draft, check, bill of exchange, or other negotiable security, although

he took it from one who had stolen it, or who had no valid title thereto. *Lawson* v. *Weston*, 4 Esp. 57; *Miller* v. *Race*, 1 Burr. 452; *Grant* v. *Vaughn*, 3 id. 1524; *Worcester Co. Bank* v. *Dorchester, etc., Bank*, 10 Cush. 489; *Wyer* v. *Dorchester, etc., Bank*, 11 id. 51.

Where goods have been deposited with a person for any purpose, and any other person than the depositor demands them from the bailee, the bailee cannot be made chargeable in trover for the goods, simply because he refuses to deliver them until he has had an opportunity to ascertain who is the real owner of the goods (*Sheridan* v. *New Quay Co.*, 4 C. B. [N. S.] 618; *Lee* v. *Bayes*, 18 C. B. 607; *Wilson* v. *Cook*, 3 E. D. Smith [N. Y.], 252; *Griffin* v. *Alsop*, 4 Cal. 406); nor until a reasonable time for that purpose has elapsed. *Carroll* v. *Mix*, 51 Barb. 212; *Dowd* v. *Wadsworth*, 2 Dev. (N. C.) 130; *Spence* v. *Mitchell*, 9 Ala. 744; *Ogle* v. *Atkinson*, 5 Taunt. 759; *Pillott* v. *Wilkinson*, 3 H. & C. 345; *Woodby* v. *Coventry*, 2 id. 164; *Buxton* v. *Baughan*, 6 C. & P. 674.

But, in order to protect the bailee, the doubt as to the title must be reasonable. *Pillott* v. *Wilkinson*, 3 H. & C. 345. Whether, if the bailor had no title, the bailee is thus protected against the real owner may, perhaps, be questionable. But the doctrine announced in *Carrol* v. *Mix*, 51 Barb. 212, would seem to be broad enough to cover such a condition. See, also, *Alexander* v. *Southey*, 5 B. & Ald. 247; *Mires* v. *Solebay*, 2 Mod. 245, where it was held that a servant who had received goods from his master was justified in not delivering them up until he had had an opportunity of ascertaining the master's wishes in the matter. But if, after having had such opportunity, he relies upon the master's title he is liable for a conversion of the goods, if such title is not good. *Lee* v. *Robinson*, 25 L. J. (C. P.) 249. Trover will not lie against a person who has a lien on the property sued for, unless the plaintiff first pays or offers to pay the amount of such lien. *Benoir* v. *Paquin*, 40 Vt. 199. Thus, a warehouseman, a carrier, a mechanic, etc., may retain goods in his possession until his charges for storage, freight, or repairs are paid, and, until they are paid or tendered to him, trover will not lie against him for the goods, unless he has waived his lien, or puts his refusal to deliver up the goods upon some other ground. *Murray* v. *Rosevelt*, Anth. (N. P.) 138; *Scarfe* v. *Morgan*, 4 M. & W. 281; *Kerford* v. *Mondel*, 28 L. J. Exch. 303; *Weeks* v. *Goode*, 6 C. B. (N. S.) 367; *Caunce* v. *Spanton*, 7 M. & Gr. 903; *Thompson* v. *Rose*, 16 Conn. 71. But if a person having a right of lien sells the goods without legal process, he thereby puts an end to the lien, and becomes liable in trover for their full value. *White* v. *Spettigue*, 13 M. & W. 603. But while an unauthorized use of a *pledge*, during the currency of the loan, does

not of itself render the pledgee liable in trover (*Halliday* v. *Holgate*, L. R., 3 Exch. 299), the rule is otherwise as to goods held under a lien raised by the law, and an unauthorized use of the property by the lienor is a conversion thereof. Property in the hands of a public officer for any purpose cannot be recovered for in trover, if there is any reasonable excuse for its detention by him. Thus, a pound-keeper is not liable in trover for not delivering up a beast lawfully impounded, until his charges are paid, nor is an individual who takes up an estray liable in trover therefor, until the expense, of its keep are paid (Buller's N. P. 45); nor is an officer, to whom goods are delivered which had been left at sea, liable in trover therefor because he refuses to deliver them until he can ascertain whether the salvage was due. *Clark* v. *Chamberlain*, 2 M. & W. 78. But if, by law, no salvage could be charged the rule would be otherwise. Id. The same rule applies as to property in the hands of an individual. Thus, if A leaves with B a horse to be depastured, and C demands the horse from B, claiming it as his property, B cannot be made chargeable in trover therefor, simply because he refuses to deliver it up to C upon demand. He is entitled to a reasonable time to ascertain whether he ought to deliver or retain it. Thus, A received goods from B, and had every reason to suppose that B owned them, though he did not positively know the fact. M. claimed and demanded the goods of A, who, while he did not claim the goods as his own, or make any claim thereto, stated the manner in which he became possessed of the goods, and how he held them, and that he wished the order of his father, before delivering them to M. The court held that this did not amount to such a conversion of the goods as made him amenable therefor in trover. See, also, *Pillott* v. *Wilkinson*, 3 H. & C. 345; *European, etc., R. M. Co.* v. *R. M. St. P. Co.*, 4 Kay & J. 676; *Dowd* v. *Wadsworth*, 2 Dev. (N. C.) 130; *Blankenship* v. *Berry*, 28 Tex. 448; *Beckley* v. *Howard*, 2 Brev. (S. C.) 94. But if, after a reasonable time has elapsed, he refuses to deliver the property, he is liable to the owner in trover. *Sargent* v. *Gile*, 8 N. H. 325. But if, under such circumstances, the defendant required the owner to do some act that he was not bound to do, or that, under the circumstances, was unreasonable, he would be liable. Thus, A put a phaeton into the hands of M. for him to paint it, and paid M. for the work. M. did not paint it, but put it on B's premises, where it remained three months. A demanded the phaeton from B, who refused to deliver it to him until he produced M., or his order therefor. The court held that this amounted to a conversion, ALDERSON, B, saying, "that was a thing he had no right to insist upon, before he delivered to a person a thing that was that person's property." But if the defendant had simply put his re-

fusal upon the ground that he wanted to ascertain whether he would be justified in delivering the property to A, the rule would have been otherwise, unless he unreasonably delayed. *Solomons* v. *Dawes*, 1 Esp. 82. Trover lies against a corporation for property converted by an agent or person having authority to act for it in that behalf (*Duncan* v. *Surrey Canal*, 3 Stark. 50); and, generally, against any person who converts the property of another without lawful or justifiable excuse (*Mead* v. *Thompson*, 78 Ill. 62; *Norman* v. *Rogers*, 29 Ark. 365; *Bertholf* v. *Quinlan*, 68 Ill. 297; *Otisfield* v. *Mayberry*, 63 Me. 197); but never against a person who holds it by lawful authority, or under justifiable circumstances (*Glaze* v. *McMillan*, 7 Port. [Ala.] 279; *Traylor* v. *Horrall*, 4 Blackf. 317; *Fairbanks* v. *Phelps*, 22 Pick. 535; *Canfield* v. *Monger*, 12 Johns. 347; *Brewer* v. *Sparrow*, 7 B. & C. 310; *Foulds* v. *Willoughby*, 8 M. & W. 540); nor, unless he has converted it to his own use or that of another. See *post*, p. 163, Art. 2, as to what amounts to a conversion.

In order to recover against several persons for a joint conversion the evidence must be such as to establish a joint concurrence therein, and if separate acts of conversion, only, are shown, the action cannot be maintained against the defendants jointly, but a separate verdict may be taken against one, or against those who are shown to have jointly converted the property. *Nicoll* v. *Glennie*, 1 M. & S. 589. Thus, if a servant in the discharge of his duty, and within its scope, converts the property of a third person for the benefit of his master, whether with or without instructions from him, both he and the master are jointly liable for the conversion. *Greenway* v. *Fisher*, 1 C. & P. 190; *Ewbank* v. *Nutting*, 7 C. B. 797. So the husband and wife may be joined in an action for a conversion by the wife alone. *Keyworth* v. *Hill*, 3 B. & Ald. 685; *Catterall* v. *Kenyon*, 3 Q. B. 310. So a carrier is jointly liable with his servant for goods delivered to the wrong person by the servant (*Ewbank* v. *Nutting*, 7 C. B. 797); and a firm, are jointly liable for a conversion by one partner, of goods that are within the line of the firm business, and for its benefit, and which were converted by the concurrence of his copartners express or implied. *Bane* v. *Dettrick*, 52 Ill. 19; *Locke* v. *Stearns*, 1 Mete. (Mass.) 560, 564; *State* v. *Neal*, 27 N. H. 131. In order to constitute a joint conversion, the acts of the several defendants need not be shown to be contemporaneous. It is enough if their acts and purposes all tend to the same end. *Cram* v. *Thissell*, 35 Me. 86.

In *Banfield* v. *Whipple*, 10 Allen, 27, the plaintiff let a horse to A, and by his directions delivered it to B, and the horse was driven to death by B, with the assent and aid of A, who was driving another horse

near by, and the court held that A and B were jointly liable in trover for the horse. So where a person is present, aiding and assisting in a tortious taking of chattels, although he is merely acting as the agent of another, he is jointly liable with the others for a conversion. *McPartland* v. *Read*, 11 Allen, 231. Where the plaintiff's daughter has his team in charge and she requests the defendant to drive her to a funeral, and while doing so, the team take fright, run away, destroy the vehicle and kill themselves, the defendant is not liable in trover, as he was a mere passenger, and the possession and control of the property was in the daughter. *Bennett* v. *Gillette*, 3 Minn. 423.

§ 6. **Perfecting the right of action.** The mere fact that a person is the owner of property in the possession of a third person, does not of itself necessarily entitle him to maintain an action of trover therefor, he must also show that he is entitled to the *immediate* possession thereof. "In order to maintain the action" says PARK, C. J., in *Ayres* v. *French*, 41 Conn. 150, "the plaintiff must have the immediate right to the property. His right of recovery depends upon his right to the property *in presenti*, and if he has no such right, he cannot recover." Therefore, if the property of A is lawfully in B's possession, B has the right to hold the same as against all the world, until A has demanded the same of him, and A can maintain no action against B therefor, until he has demanded the same of him, and thus terminated B's right of possession (*Sherry* v. *Pickens*, 10 Ind. 375; *Gurney* v. *Kenny*, 2 E. D. Smith [N. Y.], 132; *Zimmerman* v. *Fairbanks*, 35 Wis. 368; *Philpot* v. *Kelley*, 3 Ad. & El. 106; *Fairbanks* v. *Phelps*, 22 Pick. 535), unless B has *abused* his right of possession (*Norton* v. *Kidder*, 54 Me. 189; *Fisher* v. *Kyle*, 27 Mich. 454; *Johnson* v. *Whittemore*, 27 id. 463), or has actually converted the property to his own use. *Horsley* v. *Branch*, 1 Humph. 199; *Kronschnable* v. *Knoblauch*, 21 Minn. 56; *Maguyer* v. *Hawthorn*, 2 Harr. (2 Del.) 71.

If the defendant has a lien of any kind upon the property, which operates as a valid claim thereon, whether it arises under contract or by operation of law, the owner cannot maintain trover against him therefor, until he has paid or offered to pay the amount due under the lien (*Picquet* v. *McKay*, 2 Blackf. 465; *Edgerly* v. *Emerson*, 23 N. H. 555), or unless the lien is waived (*Hodgson* v. *Woodhouse*, 1 Cranch [C. C.], 549); or unless it has been lost by reason of the defendant having set up another or different claim to the goods (*Boardman* v. *Sill*, 1 Camp. 410; *Murray* v. *Rosevelt*, Anth. 138); or by an actual conversion of the goods to his own use, either by a sale thereof, or by using them for his own benefit, or permitting others to do so.

If a purchaser of goods seeks to recover for them in trover against the vendor, he must, before action brought, pay or offer to pay the price agreed upon (*Bloxam* v. *Saunders*, 4 B. & C. 941); and this seems to be the rule, even where the sale was upon credit, as in such a case the vendee must take his remedy under the contract (*Martindale* v. *Smith*, 1 Q. B. 389); and it seems that a buyer of an article that is to be made for him, acquires no such title thereto that he can maintain trover against the vendor therefor, even though he has paid the price in advance. *Sutton* v. *Campbell*, 2 N. Y. (T. & C.) 595; *Andrews* v. *Durant*, 1 Kern. 35; *People, etc.* v. *Com. of Taxes, etc.*, 58 N. Y. (13 Sick.) 242; *Mucklow* v. *Mongles*, 1 Taunt. 318; *Woods* v. *Russell*, 5 B. & Ald. 942. The rule is, that the vendee acquires no title to the articles themselves, *until they are finished and delivered to him.* Thus in *Mucklow* v. *Mangles*, 1 Taunt. 318, one Pocock entered into a contract with a barge builder, to build him a barge, and during the progress of the work he made advances to the builder until, long before the barge was completed, he had paid the entire sum due therefor. When the barge was nearly finished, the builder painted Pocock's name on the stern. Two days after the barge was completed, the barge was taken by the defendant upon an execution against the builder, Pocock in the meantime having become bankrupt, in an action of trover by the assignee against the officer making the levy, it was held that Pocock had no title to the barge until its completion and delivery to him, and, consequently, that the action would not lie. *West Jersey R. R. Co.* v. *Trenton Car Co.*, 3 Vroom, 517.

But if goods are sold upon credit, and left with the vendor, and he sells them to another *before the term of credit has expired*, he is liable to the purchaser in trover, for the actual damage he has sustained, even though he does not tender the price of the goods. *Chinery* v. *Viall*, 5 H. & N. 288. And it has been held that, even though the purchaser is in default, and has not paid or offered to pay within the time agreed upon, but tendered the money *before there had been a conversion of the goods by the vendor*, trover lies in his favor for the goods. *Martindale* v. *Smith*, 1 Q. B. 389.

Where property has been leased to a person for a fixed time, and the lessor permits him to retain the property after the time has expired, he cannot maintain trover for the property until he has first withdrawn his assent to its retention by the lessee and demanded the property. *Thompson* v. *Moesta*, 27 Mich. 182. And where property is leased at will with liberty on the part of the lessee to purchase at a certain price, if he elects to do so, the lessor cannot maintain trover against a person who wrongfully took it out of the lessee's possession until after he has

terminated the lease by a demand of the property or the purchase-money. *Fairbank* v. *Phelps*, 22 Pick. 535.

Where goods have been fraudulently exchanged, the person defrauded cannot maintain trover until he has first put, or offered to put, the other party *in statu quo*, by a return of the property (*Kimball* v. *Cunningham*, 4 Mass. 502); and generally it may be said that, in order to maintain the action, the plaintiff must do every thing that is necessary to remove any claim, legal or equitable, that the defendant may have upon the property, and take all the steps necessary to put him in the position of a wrong-doer, holding the property without color of right. In order that it may be understood, when a lien exists upon property, that must be removed before trover will lie, it may not be amiss to state here, when and how a lien arises. When property is delivered to another to be, by his skill and labor, or by the addition thereto of property of his own, increased in value, he has a lien on the article both for his labor and materials, whether the price was agreed upon or not, unless there is a contract inconsistent with such lien. *Gregory* v. *Stryker*, 2 Denio, 628; *Hanna* v. *Phelps*, 7 Ind. 21; *Morgan* v. *Congdon*, 4 N. Y. (4 Comst.) 552; *Partridge* v. *Dartmouth College*, 5 N. H. 286; *McFarland* v. *Wheeler*, 26 Wend. 467; *Franklin* v. *Hosier*, 4 B. & Ald. 341; *Williams* v. *Allsup*, 10 C. & B. (N. S.) 417; *Blake* v. *Nicholson*, 3 M. & S. 167. Thus, a mechanic of any kind has a lien upon all personal property for manufacture or repairs, while it remains in his possession (*Ex parte Shank*, 1 Atk. 234; *Franklin* v. *Hosier*, 4 B. & Ald. 341; *Blake* v. *Nicholson*, 3 M. & S. 167; *Clark* v. *Hale*, 34 Conn. 398; *Moore* v. *Hitchcock*, 4 Wend. 292; *Bevan* v. *Waters*, 3 C. & P. 520; *Bleaden* v. *Hancock*, M. & M. 465); as a shipwright for repairs on a ship (*Ex parte Shank*, 1 Atk. 234); a printer to whom paper had been delivered to be printed upon (*Blake* v. *Nicholson*, 3 M. & S. 167); a stereotype printer who receives plates to print from (*Bleaden* v. *Hancock*, M. & M. 465); a miller who grinds grain at his mill (*Chase* v. *Westmore*, 5 M. & S. 180); a carriage maker for repairs upon a carriage, a jeweller for repairs upon a watch or jewelry, and generally, any person who bestows labor upon the property of another, has a lien upon the property upon which the labor was bestowed, for the reasonable price thereof (*Mount* v. *Williams*, 11 Wend. 77; *Jarvis* v. *Rogers*, 15 Mass. 389; *Urquhart* v. *McIver*, 4 Johns. 114; *McFarland* v. *Wheeler*, 26 Wend. 467; *Allen* v. *Spencer*, 1 Edm. [N. Y.] 117); unless there was an agreement to give credit (*Clark* v. *Hale*, 34 Conn. 398); or there is a special agreement inconsistent therewith. *Bailey* v. *Adams*, 14 Wend. 201; *Trus* v. *Pirsson*, 1 Hilt. (N. Y.) 292; *Fieldings* v. *Mills*, 2 Bosw. 489. This

lien, however, only extends to the *identical articles* upon which the labor was bestowed, and does not extend to other articles of the same kind in the possession of the lienor belonging to the lienee, upon which nothing has been done. Thus, if A furnishes B materials for the manufacture of a suit of clothes, B has a lien upon the cloth for the price of manufacture, *but he has no lien upon the materials that are left*, and if he delivers the clothes without exacting the price, he cannot hold the balance of the materials, unless by agreement, the lien was transferred to them. His lien extends only to the labor done, and does not embrace other charges, as for keeping the property, or for labor upon other articles (*British Emp. Ship Co.* v. *Somes*, 8 H. L. Cas. 338; 30 L. J. Q. B. 229; *Campston* v. *Heigh*, 2 Scott, 684; *Bleaden* v. *Hancock*, M. & M. 465); nor does it extend to tools or machinery furnished by the person for whom the labor was done, with which to perform the labor, unless such is the custom of the trade, or there is an agreement to that effect. *Bleadon* v. *Hancock*, M. & M. 465. It is not assignable nor attachable, but exists only in favor of the person who performed the labor or had it performed, consequently if A makes repairs upon B's carriage, and sells out his business, as well as his outstanding accounts to C, C cannot set up A's lien upon the carriage in defense to an action of trover brought against him by the owner of the carriage (*McFarland* v. *Wheeler*, 26 Wend. 467; *Meany* v. *Head*, 1 Mas. [C. C.] 319; *Urquhart* v. *McIver*, 4 Johns. 114); nor does it exist *after* the property has been voluntarily delivered to the owner by the lienor before the price is paid (*Jorden* v. *James*, 5 Ham. [Ohio] 88; *Pomroy* v. *Kingsley*, 1 Tyler [Vt.], 294); nor if it is waived by the lienor by neglecting to set it up, or if he claims to hold the property upon some other ground (*Picquet* v. *McKay*, 2 Blackf. 465; *LaMotte* v. *Archer*, 4 E. D. Smith [N. Y.], 46); or where he uses the property in a manner inconsistent with the lien. *Holly* v. *Huggeford*, 8 Pick. 73. If the lienee takes the property away, without the assent of the lienor, the lienor may pursue the property or maintain trover against him for it. *Allen* v. *Spencer*, 1 Edm. (N. Y.) 117; *Partridge* v. *Dartmouth College*, 5 N. H. 286. If the lienor *permits* the property to go into the hands of the lienee, without payment of the sum due, his lien is irretrievably lost, and is not revived if the property again comes into his hands. *Grinnell* v. *Cook*, 3 Hill, 485; *McFarland* v. *Wheeler*, 26 Wend. 467; *Walther* v. *Wetmore*, 1 E. D. Smith (N. Y.), 7. If a person having the property of another in his possession for repairs, manufacture or otherwise, and he loans him money thereon, he cannot retain a lien upon the property for such loan unless there was a special agreement to that effect (*Roberts* v. *Kain*, 6 Rob. [N. Y.]

354; *Picquet* v. *McKay*, 2 Blackf. 465; *Allen* v. *Megguire*, 15 Mass. 490; *Jarvis* v. *Rogers*, 15 id. 389); neither can a lien arise unless there is a special agreement therefor, or unless it is in accordance with the usages of the trade. Therefore it is held that an agistor has no lien upon cattle for their pasturage, or a stable keeper for the keep of a horse, or a commission merchant for advances made upon goods. *Fox* v. *McGregor*, 11 Barb. 41; *Neff* v. *Thompson*, 8 id. 213; *Bissell* v. *Pearce*, 28 N. Y. (1 Tiff.) 252; *Cook* v. *Grinnell*, 3 Hill, 485; *Jarvis* v. *Rogers*, 15 Mass. 389; *Roberts* v. *Kain*, 6 Rob. (N. Y.) 354; *Picquet* v. *McKay*, 2 Blackf. 455. A person has no lien for repairs made without the knowledge or assent of the owner (*Clark* v. *Hale*, 34 Conn. 398); even though they were made at the request of a person who had the property in his possession, if such person, in fact, had no authority from the owner to have such repairs made. *Hiscox* v. *Greenwood*, 4 Esp. 174. Whenever a lien exists, the owner cannot recover the property in trover *from the lienor*, unless he has first discharged, or offered to discharge the lien, unless the lienor has waived or forfeited his lien (*Allen* v. *Spencer*, 1 Edm. [N. Y.] 117; *Partridge* v. *Dartmouth College*, 5 N. H. 286); and the rules stated above will generally furnish a guide by which it can be determined where any such claim exists upon property. See Vol. 4, pp. 315–336, title *Lien*.

§ 7. **What title or possession is required.** In order to maintain trover, the plaintiff must have had the actual custody of, or some species of property, either general or special, in the articles sought to be recovered. *Bertholf* v. *Quinlan*, 68 Ill. 297; *Glaze* v. *McMillion*, 7 Port. (Ala.) 279; *Barton* v. *Dunning*, 6 Blackf. 209; *Ayres* v. *French*, 41 Conn. 142; *Kemp* v. *Thompson*, 17 Ala. 9; *Hostler* v. *Skull*, 1 Taylor, 152; *Kennington* v. *Williams*, 30 Ala. 361; *Pyne* v. *Dor*, 1 T. R. 55; *Hickok* v. *Buck*, 22 Vt. 149; *Swift* v. *Moseley*, 10 id. 208. But a vested legal interest is sufficient. *Pope* v. *Tucker*, 23 Ga. 484. The plaintiff must also have an immediate right to the possession of the property. *Owen* v. *Knight*, 4 Bing. N. C. 54; *Gordon* v. *Harper*, 7 T. R. 9; *Clark* v. *Adam*, 1 C. & F. 242; *Clark* v. *Draper*, 19 N. H. 419; *Ayres* v. *French*, 41 Conn. 142; *Winship* v. *Neale*, 10 Gray, 382. And this right must have existed at the time when the action was brought. *Jones* v. *Sinclair*, 2 N. H. 319; *Burton* v. *Tannehill*, 6 Blackf. 470; *Fairbank* v. *Phelps*, 22 Pick. 535; *Caldwell* v. *Cowan*, 9 Yerg. 262; *Bradley* v. *Copley*, 1 C. B. 685; *Andrews* v. *Shaw*, 4 Dev. (N. C.) 70. A purchaser of goods which remain in possession of the vendor, subject to the vendor's lien for unpaid purchase-money, cannot maintain an action of trover against

a wrong-doer. *Lord* v. *Price*, L. R., 9 Exch. 54; 8 Eng. Rep. 505. Mere naked possession is sufficient to entitle one to maintain the action against one who is a mere trespasser. *Knapp* v. *Winchester*, 11 Vt. 351; *Cook* v. *Patterson*, 35 Ala. 102; *Nicolls* v. *Bastard*, 1 Gale, 295; *Jefferies* v. *Gt. Western Railway Co.*, 5 El. & Bl. 802. But the right of possession must have been lawfully acquired, and must be better than that of the defendant. If their rights are equal, the action will not lie, as the plaintiff must recover upon the strength of his own title, and cannot rely upon the weakness of the defendant's title (*Davidson* v. *Waldron*, 31 Ill. 120; *Mulligan* v. *Bailey*, 28 Ga. 507); and if neither the plaintiff nor his grantor ever had any title to the property, he may be nonsuited, in those States where a nonsuit is permissible (*Raines* v. *Perryman*, 29 Ga. 529); and mere possession by the defendant, without any title, is good as against the claim of a person under an invalid or fraudulent title. *Mulligan* v. *Bailey*, 28 Ga. 507; *Raines* v. *Perryman*, 29 id. 529. Thus, in the case last cited, the plaintiff sought to recover for a slave in the defendant's possession. The claim was predicated upon a sale of the slave to him by a person who, it appeared, never had any valid title to her. The court held that there could be no recovery, because the defendant, being in possession, had a right to retain the slave against every one, except a person having a superior right. In *Buckley* v. *Gross*, 3 B. & S. 566, a fire having taken place in a warehouse, in which a quantity of tallow was stored, the tallow melted and flowed down into the sewers, and from there into the river, from which portions of it were taken by different persons. A, one of the persons, sold some of the tallow to the plaintiff which was taken from him by the police, and he was taken before a magistrate and charged with having stolen or unlawfully obtained it. The charge was dismissed by the magistrate, but he directed the tallow to be sold under the provisions of the statute, and the defendant purchased it at such sale. The plaintiff having brought an action of trover for the tallow, it was held that he had no such title or right thereto, as would uphold the action. See, also, *Dyer* v. *Vandenbergh*, 11 Johns. 159; *Gibbs* v. *Linley*, 13 Vt. 208.

Constructive possession of property is sufficient to entitle the plaintiff to a recovery (*Corfield* v. *Coryell*, 4 Wash. C. C. 371); as, where an officer makes an attachment or levy upon property, upon a writ of attachment or execution, in the mode designated by statute, he thereby acquires a constructive possession of the goods that will uphold an action of trover for their conversion. *Lloyd* v. *Wyckoff*, 6 Halst. (N. J.) 218; *Hamilton* v. *Hamilton*, 1 Dutch. 544; *Dennie* v. *Harris*, 9 Pick. 364; *Polley* v. *Lenox Iron Works*,

15 Gray, 513; *Davidson* v. *Waldron*, 31 Ill. 120; *Williams* v. *Herndon*, 12 B. Monr. 484. So where a person has purchased property, and paid the purchase-price and it has been set apart for him, and nothing remains to be done except to take the property away, he has a sufficient legal possession to entitle him to maintain trover against either the vendor, or any other person who converts it (*Austen* v. *Craven*, 4 Taunt. 644; *Bryans* v. *Nix*, 4 M. & W. 775; *Payne* v. *Brander*, 2 Stark. 568; *Chinery* v. *Viall*, 5 H. & N. 288; *Woods* v. *Russell*, 5 B. & Ald. 942), except, possibly, an attaching or levying creditor.

A finder of property has such a special property therein, that he can maintain trover therefor against any person except the true owner or one having a better title than himself (*Bridges* v. *Hawkesworth*, 7 Eng. L. & Eq. 424; *Mathews* v. *Harsell*, 1 E. D. Smith [N. Y.], 393; *Clark* v. *Maloney*, 3 Harr. [Del.] 68; *Tancil* v. *Seaton*, 28 Gratt. 601; *N. Y. & Harlem R. R. Co.* v. *Hawes*, 56 N. Y. (11 Sick.) 175, 178; *Durfee* v. *Jones*, 11 R. I. 588; *Armory* v. *Delamirie*, 1 Str. 505), provided, however, he must be an *innocent* finder, and must not have taken the property fraudulently or feloniously, knowing, or having the means of knowing, who the owner is, and with such knowledge, or means of knowledge, neglecting to give it up. *Buckley* v. *Gross*, 3 B. & S. 566. The finder of property may maintain trover for the articles found by him, even against the owner of the premises upon which they were found. Thus, in *Bridges* v. *Hawkesworth*, 7 Eng. L. & Eq. 424, the plaintiff, being in the defendant's shop, picked up a small parcel that was lying there, and showed it to the defendant. The parcel, upon being opened, was found to contain bank notes. The plaintiff requested the defendant to keep them, and deliver them to the owner, and the defendant advertised for the owner, but, after three years, no one having appeared to claim them, the defendant refused to deliver them up to the plaintiff, although he offered to indemnify him against any claim in respect to the notes, and to pay him the expenses of advertising. The court held that the defendant was liable in trover for the notes. See, also, *Armory* v. *Delamirie*, 1 Str. 505; *Mathews* v. *Harsell*, 1 E. D. Smith (N. Y.), 393; *Clark* v. *Malloney*, 3 Harr. (Del.) 68; *McLaughlin* v. *Waite*, 9 Cow. 670. But the property must be *found*, that is, it must, at the time when the finder came upon it, have been in such a situation as to clearly indicate that it was *lost*, and not voluntarily placed by the owner, where it was found, by carelessness or forgetfulness. *If it was evidently laid where it was found, it then becomes the duty of the owner of the premises, to keep the property for its owner*, as, in such cases, he is treated as a *quasi* bailee, and

he may maintain trover therefor against the finder; as if a pocket-book is found upon a table, desk, counter, etc., in a store, bank or other building, the presumption is, that the owner placed it there and forgot it; but, if it is found upon the floor or in any situation where it is evident that it came there by accident or mischance, it is treated as lost property and the finder is entitled thereto as against everybody but the true owner. *McAvoy* v. *Medina*, 11 Allen, 548; *Brandon* v. *Huntsville Bank*, 1 Stew. (Ala.) 320. Indeed, this rule is so strict, that it has been held that, in an indictment for stealing lost property, when the real owner is unknown, it should be alleged to be the property of the finder. *Regina* v. *Peters*, 1 C. & K. 245.

Where a person in the custody of property belonging to another, as a carrier, delivers it to the wrong person by mistake, he is treated as still being in constructive possession of the property, so far as to enable him to maintain trover for it as against the person to whom it was so delivered. Thus, where a carrier left a lot of hides belonging to another person, through mistake, with a tanner, whose servants appropriated them for his benefit, the tanner having been seasonably notified of the mistake, it was held that the carrier might maintain trover against him for the hides (*Cheshire R. R. Co.* v. *Foster*, 51 N. H. 490. See, also, *Ill. Cent. R. R. Co.* v. *Parks*, 54 Ill. 274); or the owner may sue such person in trover. *Bartlett* v. *Hoyt*, 33 N. H. 151.

Generally, it may be said that the decisive test as to when an action of trover may be maintained is, whether the plaintiff has the *right* to the possession of the property at the time when the action was brought. If so, the action may be maintained, even though the defendant is the real owner of the property, as, where the plaintiff is the lessee of the property for a term that has not expired (*Billings* v. *Tucker*, 6 Gray, 368; *Grant* v. *King*, 14 Vt. 367; *Hickok* v. *Buck*, 22 Vt. 149), or has a lien upon the property that has not been discharged, forfeited or waived. *Allen* v. *Spencer*, 1 Edm. (N. Y.) 117; *Partridge* v. *Dartmouth College*, 5 N. H. 286.

Where a person acquires a right to the custody of property by contract, or by operation of law, he may maintain trover for it, against any person who wrongfully withholds it (*Branch* v. *Morrison*, 6 Jones [N. C.], 16; *Parkhurst* v. *Jacobs*, 17 Mich. 302; *Bowen* v. *Fenner*, 40 Barb. 385; *Chinery* v. *Viall*, 5 H. & N. 288), and to this end, *the right of possession is superior to the right of property* (*Bloxam* v. *Sanders*, 4 B. & C. 941), for the right of property may be in one person, and the right to the present possession be in another, and where they do not concur, the action is only maintainable by him

who has the right to the immediate possession. *Hickok* v. *Burt*, 22 Vt. 15. He must be in a position that entitles him to the possession of the property *at the time of demand and suit brought*. *Clark* v. *Draper*, 19 N. H. 419; *Clapp* v. *Glidden*, 39 Me. 448. Therefore, the lessor of property for a term, although the title to the property is in him, cannot maintain trover therefor against a person who takes it out of the custody of the lessee, unless the lessee has so conducted with the property as to put an end to his right to its possession under the lease (*Billings* v. *Tucker*, 6 Gray, 368; *Harvey* v. *Epps*, 12 Gratt. 153), and a sale, or abuse of the property by the lessee has that effect. *Billings* v. *Tucker*, 6 Gray, 368; *Grant* v. *King*, 14 Vt. 367; *Lovejoy* v. *Jones*, 20 N. H. 164.

§ 8. **What property may be converted.** Trover lies for every species of personal property, animate or inanimate. Thus, it has been held that it lies for a dog, although by statute the defendant had a right to kill it, because it had no collar on (*Cummings* v. *Perham*, 1 Metc. [Mass.] 555; *Binstead* v. *Buck*, 1 W. Bla. 1117); for animals *ferae naturae* that have been domesticated; as wild geese, which, after they had been tamed, strayed away, but which had not regained their natural liberty (*Amory* v. *Flynn*, 10 Johns. 102); so for a horse, or any species of animals which are the subject of property, and which have not returned to their wild state. *Henly* v. *Walsh*, 2 Salk. 686; *Williams* v. *Belthany*, 2 Const. Rep. (S. C.) 415. So it lies for any valuable paper, whether it be an evidence of indebtedness or of title to things real or personal, as a deed (*Spencer* v. *Dearth*, 43 Vt. 98; *Day* v. *Whitney*, 1 Pick. 503); a promissory note (*Stephenson* v. *Feezer*, 55 Ind. 416; *Vininger* v. *Banning*, 7 Minn. 274; *Donnell* v. *Thompson*, 13 Ala. 440); where the owner of a past due promissory note puts it into the hands of A for collection, and A sells it to B, the owner may maintain trover against B (*Seago* v. *Pomeroy*, 46 Ga. 227; *Spencer* v. *Dearth*, 43 Vt. 98; *Stewart* v. *Martin*, 49 id. 266; *Kingman* v. *Pierce*, 17 Mass. 247; *Griswold* v. *Judd*, 1 Root, 221); whether in the hands of a third person (*Todd* v. *Cruikshanks*, 3 Johns. 432), or in the hands of a person who obtained it by fraud (*Griswold* v. *Judd*, 1 Root, 221), either of himself or a third person at his instigation or with his knowledge (*Netleton* v. *Riggs*, id. 125); or in the hands of a payee, or any other person, after it has been fully paid and satisfied. *Park* v. *McDaniels*, 37 Vt. 594; *Spencer* v. *Dearth*, 43 id. 98. So, it lies for a policy of insurance (*Harding* v. *Carter*, 1 Park on Ins. 4); for an agreement or contract, even though not stamped as required by law (*Scott* v. *Jones*, 4 Taunt. 865); for a check, although it is not indorsed (*Tilden* v. *Brown*, 14 Vt. 164); for an execution (*Keeler* v. *Fassett*,

21 id. 539); for a bond (*Bullock* v. *Rogers*, 16 id. 294); for a parish book of record (*Stebbins* v. *Jennings*, 10 Pick. 172; *Sudbury* v. *Stearns*, 21 id. 148); for a judgment roll (*Hudspeth* v. *Wilson*, 2 Dev. [N. C.] 372); but not for a justice's judgment (*Cobb* v. *Carnegay*, 6 Ired. L. 358); for bank notes that can be identified (*Moody* v. *Keener*, 7 Port. [Ala.] 218); or even when they cannot be; as against a cashier of a bank or other person who converts bank bills left with him on special deposit. *Coffin* v. *Anderson*, 4 Blackf. 395. So, for drafts, bills of exchange, or securities of any kind, whether negotiable or not, or for a receipt, or any valuable paper. *Comparet* v. *Burr*, 5 Blackf. 419; *Ayres* v. *French*, 41 Conn. 151; *Tucker* v. *Jewett*, 32 id. 563. So, it lies for certificates of stock in an incorporated company (*Ayres* v. *French*, 41 Conn. 151; *Cousland* v. *Davis*, 4 Bosw. [N. Y.] 619; *Monk* v. *Graham*, 8 Mod. 9; *Tisdale* v. *Harris*, 20 Pick. 9; *Maryland F. Ins. Co* v. *Dalrymple*, 2 Md. 242; *Freeman* v. *Harwood*, 49 Me. 195; *Fisher* v. *Brown*, 104 Mass. 259); for a letter, wrongfully withheld by a postmaster, or a newspaper (*Teall* v. *Felton*, 1 N. Y. [1 Comst.] 537; 12 How. [U. S.] 284); or for papers and exhibits filed as evidence in a case on trial before a justice of the peace. *Yates* v. *Pelton*, 48 Vt. 314. So, for books of account, vouchers, manuscript, drawings, copies, or any valuable paper of any kind or description. (*Ayres* v. *French*, 41 Conn. 151; *Fullam* v. *Cummings*, 16 Vt. 697); a chattel mortgage. *Stephenson* v. *Feezer*, 55 Ind. 416. So, it lies for gold or silver coins, as where a coin is paid to one by mistake for a smaller coin than it really was; but in order to maintain the action, the plaintiff must first have put, or offered to put the defendant *in statu quo* (*Chapman* v. *Cole*, 12 Gray, 141); or for money in a bag, letter, or sealed package. *Moody* v. *Keener*, 7 Port. (Ala.) 218. It lies for a whale which has been killed and anchored, with marks of appropriation thereon, by the captors. *Taber* v. *Jenny*, Sprague (C. C.), 315; *Bourne* v. *Ashley*, 1 Low. 27. So, for a building that has been severed from the freehold and removed (*Smith* v. *Benson*, 1 Hill, 176); or that is set on wooden blocks, without underpinning. *Dame* v. *Dame*, 38 N. H. 429; *Hinckley* v. *Baxter*, 13 Allen, 139; *Adams* v. *Goddard*, 48 Me. 212; *Hinckley* v. *Baxter*, 13 Allen (Mass.), 139; *Pullen* v. *Bell*, 40 Me. 314; *Davis* v. *Taylor*, 41 Ill. 405; *Crippen* v. *Morrison*, 13 Mich. 23. So, for manure that is severed from the freehold and carried to other premises (*Stone* v. *Proctor*, 2 Chip. [Vt.] 116; *Fay* v. *Muzzey*, 13 Gray, 53); or that is not incorporated with the soil. *Pinkham* v. *Gear*, 3 N. H. 484; *Noble* v. *Sylvester*, 42 Vt. 146; *Ford* v. *Cobb*, 20 N. Y. 344. So, for sand, gravel, ore, or any thing pertaining to the freehold, after it is severed therefrom (*Northam* v. *Bowden*,

11 Exch. 70; *Riley* v. *Boston Water Power Co.*, 11 Cush. 11); as growing crops, grass, trees, etc. *Whidden* v. *Seelye*, 40 Me. 247; *Sampson* v. *Hammond*, 4 Cal. 184; *Forsyth* v. *Wells*, 41 Penn. St. 291; *Branch* v. *Morrison*, 5 Jones, 16. So, it lies for an undivided part of a chattel, where the whole has been converted (*Watson* v. *King*, 4 Camp. 272; *Moore* v. *Aldrich*, 25 Tex. Supp. 272); and for any species of personal property. *Brice* v. *Vanderheyden*, 9 Wend. 472; *Branch* v. *Morrison*, 5 Jones, 16; *Chapman* v. *Cole*, 12 Gray, 141; *Ayres* v. *French*, 41 Conn. 140; *Bartlett* v. *Hoyt*, 29 N. H. 317.

If a person collects and piles any species of property upon public or vacant lands, or upon a highway, to which no particular individual has a title, he thereby acquires such a title thereto as will uphold an action of trover against any person who takes it away and converts it. Thus, in *Haslem* v. *Lockwood*, 37 Conn. 500; S. C., 9 Am. Rep. 350, the plaintiff raked manure into heaps, that had accumulated in the street, the fee of which was in the borough, intending to remove it. Before he could do so, and within twenty-four hours, the defendant drew it away in a cart. The court held that the plaintiff had such a title to, and such constructive possession of the manure, as would uphold an action of trover for it. So, where a person cuts and piles wood on public or vacant lands, or grass, rushes, etc., and leaves them there, intending to remove them, it is held that, by the very act of severance, by him, he *prima facie* acquires such title thereto as will uphold an action of trover in his favor against any person who converts it. *Rockham* v. *Jessup*, 3 Wils. 332; *Northam* v. *Bowden*, 11 Exch. 70; *Rome* v. *Brenton*, 8 B. & S. 327. The plaintiff makes out his case and right of recovery when he shows that he has a right to the immediate possession of the property, and he is not required to prove either that he owns, or ever had possession of the property. It is enough that he is entitled, of right, to the immediate possession of the property. *Ayres* v. *French*, 41 Conn. 140; *Smith* v. *Milles*, 1 T. R. 480; *Fowler* v. *Down*, 1 B. & P. 47. Thus, when goods have been taken from the possession of another, the defendant must stand upon his own title, and failing to establish any title in himself, he cannot set up title in a third person, unless he connects himself with that title; therefore, a mere wrong-doer, from whose possession goods have been wrongfully taken by another, can recover in trover therefor, upon the strength of his possession alone, and the defendant will not be permitted to defeat a recovery, by showing that the plaintiff *wrongfully* held the property. *Jefferies* v. *Gt. Western R. R. Co.*, 5 El. & Bl. 806; *People* v. *Sherwin*, 2 T. & C. (N. Y.) 528.

§ 9. **What property is not a subject of conversion.** As we have

previously stated, trover lies only for personal property, and cannot be maintained for real estate, or a fixture forming a part of the realty, so long as it is connected therewith. *Colegrove* v. *Dias Santas*, 2 B. & C. 78; *Pullen* v. *Bell*, 40 Me. 314; *Sampson* v. *Hammond*, 4 Cal. 184; *Whidden* v. *Seelye*, 40 Me. 247; *Woodruff Iron Works* v. *Adams*, 37 Conn. 233; *Smith* v. *Archer*, 53 Ill. 241; *Parker* v. *Goddard*, 39 Me. 144; *Dame* v. *Dame*, 38 N. H. 429; *Hinckley* v. *Baxter*, 13 Allen, 139; *Davis* v. *Taylor*, 41 Ill. 405; *Crippen* v. *Morrison*, 13 Mich. 23; *Overton* v. *Williston*, 31 Penn. St. 155. Thus, it does not lie for standing trees, growing crops, as grass, corn, oats, etc. (*Whidden* v. *Seelye*, 40 Me. 247; *Forsyth* v. *Wells*, 41 Penn. St. 291); or for grass or vegetables eaten by cattle that break into an inclosure (*Smith* v. *Archer*, 53 Ill. 241); or for ores or minerals not mined from the earth (*Sampson* v. *Hammond*, 4 Cal. 184); or for manure that is incorporated with the soil and forms a part of the realty (*Fay* v. *Muzzey*, 13 Gray, 53); unless it is agreed that the manure shall not pass by lease or deed, but shall be treated as personalty. *Strong* v. *Doyle*, 110 Mass. 92; *Bostwick* v. *Leach*, 3 Day (Conn.), 476; *Noble* v. *Sylvester*, 42 Vt. 146; *Ropps* v. *Barker*, 4 Pick. 239; *Ford* v. *Cobb*, 20 N. Y. 344. Nor does it lie for a building affixed to the soil, but it does lie for one not annexed to the freehold, which the owner of the soil refuses to permit the owner to remove. *Dame* v. *Dame*, 38 N. H. 429; *Pullen* v. *Bell*, 40 Me. 314; *Smith* v. *Benson*, 1 Hill, 176; *Overton* v. *Williston*, 31 Penn. St. 155; *Hinckley* v. *Baxter*, 13 Allen, 139; *Crippen* v. *Morrison*, 13 Mich. 23; *Adams* v. *Goddard*, 48 Me. 212. In reference to fixtures, in order to determine whether trover will lie for them, it is to be remembered that a broad distinction exists, between articles annexed to the freehold by any tenant, and those that are put there by the owner himself. That is, that an action of trover may lie between a landlord and tenant for things annexed to the freehold, when it would not lie as between the vendor and vendee of lands. The strict rule, as to fixtures, as between heir and executor, or grantor and grantee, does not exist as between landlord and tenant, but the rule is relaxed in favor of fixtures annexed to the estate for the purposes of trade, and may be removed by a tenant at any time before his time expires, but not after (*Weathersby* v. *Sleeper*, 42 Miss. 732; *Wilgus* v. *Gettings*, 21 Iowa, 177; *Treadway* v. *Sharon*, 7 Nev. 37; *Dingley* v. *Buffum*, 57 Me. 381; *Thomas* v. *Crout*, 5 Bush [Ky.], 37); unless he is restrained by the landlord from moving them, in which case he may remove them within a reasonable time after the injunction is dissolved. *Mason* v. *Fenn*, 13 Ill. 525. In *Van Ness* v. *Pacard*, 2 Pet. 137, this distinction is well illustrated. In that case the defendant leased premises for a dairy farm,

for a term of years. He erected thereon, for his use in the prosecution of the business, a frame dwelling-house, with a cellar, and a stone or brick foundation. Prior to the expiration of his term, he tore down the building and converted the materials. The landlord sued him for waste, but the court held that there could be no recovery, STORY, J., saying, "It has been suggested at the bar, that the exception in favor of trade has never been applied in a case like that before the court where a large house has been built, and used in part as a family residence, but the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is of one or two stories high or has a brick or other chimney. *The sole question is, whether it was designed for the purposes of trade or not.* A tenant may erect a large, as well as a small messuage, or a soap boilery of one or two stories high, and on whatever foundation he may choose." This rule is predicated upon the ground that the landlord impliedly assents to the erection upon, or annexation to the freehold, of any thing required by the tenant for his convenience in the prosecution of business for which the premises were rented, and also of their removal by him if he chooses to remove them, while he has the lawful possession of the premises. This being the case where assent is implied, it follows as a matter of course, that erections upon or annexations made to the freehold by the owner's express license, may also be removed by the licensee, and such is the rule. *Fisher* v. *Saffer*, 1 E. D. Smith (N. Y.), 611; *Reid* v. *Kirk*, 12 Rich. (S. C.) 54. But erections made without the owner's assent become a part of the realty, even though made under a mistake as to boundaries or title (*Hines* v. *Ament*, 43 Mo. 298); and even though the larger portion of the building is upon the builder's land. *Bolling* v. *Whittle*, 1 Ala. Sel. Cas. 268. In such cases the buildings become a part of the realty immediately upon their erection. *Curtis* v. *Riddle*, 7 Allen, 185; *Washburn* v. *Sproat*, 16 Mass. 449; *Reid* v. *Kirk*, 12 Rich. (S. C.) 54. Indeed, it seems to be the rule that, in all cases where a tenant annexes property to the freehold, either with the express or implied assent of the landlord, so that it cannot be removed without injury thereto, it cannot be levied upon as the property of the tenant, but is treated as realty, until severed by the tenant. *Pemberton* v. *King*, 2 Dev. (N. C.) 376. The fact that *he* can remove it does not, so long as it remains annexed to the freehold, destroy its character as a fixture, so as to make it personal property which is liable to be attached for his debts. As to the tenant, *if he elects to treat them as such*, they are personal property, yet if he sells them to the landlord, they *instanter* become realty (*Powers* v. *Dennison*, 30 Vt. 752; *Burnside* v. *Twitchell*,

43 N. H. 390; *Curtis* v. *Riddle*, 7 Allen, 185); and it is believed, following the doctrine of *Curtiss* v. *Riddle*, id., that a sale made after a levy, and before severance by the tenant, would so change the character of the property as to defeat the levy. See *Wells* v. *Banister*, 4 Mass. 514; *White's Appeal*, 10 Penn. St. 252; *Dame* v. *Dame*, 38 N. H. 429; *Fuller* v. *Tabor*, 39 Me. 519; *Taylor* v. *Townsend*, 8 Mass. 411; *Washburn* v. *Sproat*, 16 id. 449. This much seemed necessary, as to the law relating to fixtures, to enable the reader to understand when trover will, and when it will not lie for any thing annexed to the realty. See Vol. 3, pp. 368–394, title *Fixtures*. From what has been said, it will be seen that, if a landlord evicts a tenant before his term expires, and refuses to permit him to take away buildings or other annexations to the realty made by his consent, express or implied, he would be liable in trover for them. But where a tenant makes permanent erections *without* the assent of the landlord, express or implied, they become fixtures which he has no right to remove, and *instanter* become the property of the landlord, and if the tenant severs them, even during his tenancy, he is liable in trover for them; for, upon severance, although they become personalty, they still remain the property of the landlord. *Fisher* v. *Saffer*, 1 E. D. Smith (N. Y.), 611; *Washburn* v. *Sproat*, 16 Mass. 449; *Reid* v. *Kirk*, 12 Rich. (S. C.) 54.

In the remarks hereafter made, it must be understood that they exclude the relation of landlord and tenant and only apply as between the vendor and vendee of real estate, or others not having any contract relation to the premises as tenants. As previously stated, trover does not lie for fixtures, so long as they remain annexed to the freehold; therefore, it does not lie for gas fixtures, including gasometers, and apparatus for generating gas (*Lawrence* v. *Kemp*, 1 Duer [N. Y.], 363; *Hays* v. *Doane*, 11 N. J. Eq. 84), nor for the materials comprising a fence, however built (*Hines* v. *Ament*, 43 Mo. 298; *Wentz* v. *Fincher*, 12 Ired. 297; *Glidden* v. *Bennett*, 43 N. H. 306), but it will lie for rails or other materials not made into a fence. *Robertson* v. *Phillips*, 3 Iowa, 320. It does not lie for a building, erected upon a foundation and annexed to the land (*Gibbs* v. *Estey*, 15 Gray, 587), though only set on stone posts (*Landon* v. *Platt*, 34 Conn. 517), nor for a stone used as a doorstep (*Woodman* v. *Pease*, 17 N. H. 282), nor for a gin house, or its packing screw or running gear (*McDaniel* v. *Moody*, 3 Stew. [Ala.] 314), or a cistern standing on blocks in the cellar of a building (*Blethen* v. *Towle*, 40 Me. 310), or iron staves fastened to the brick work of a chimney (*Goddard* v. *Chase*, 7 Mass. 432), or set in bricks and mortar (*Smith* v. *Heiskell*, 1 Cr. [C. C.] 99), or a furnace annexed to a building (*Main* v. *Schwarzwaelder*, 4 E. D. Smith [N. Y.],

273), as, a furnace set in a pit in the cellar to warm the house, including the pipes for conveying the heated air (*Stockwell* v. *Campbell*, 39 Conn. 362; 12 Am. Rep. 393), or for steam engines, boilers, mills, machinery, etc., annexed to a building as a permanent part thereof (*Smutzer* v. *Jones*, 35 Vt. 317; *Baker* v. *Davis*, 19 N. H. 325; *Sparks* v. *State Bank*, 7 Blackf. 469; *Christian* v. *Dripps*, 28 Penn. St. 271; *Corliss* v. *McLagin*, 29 Me. 115; *Hill* v. *Hill*, 43 Penn. St. 531; *Voorhees* v. *McGinnis*, 48 N. Y. 278), or for gas brackets or chandeliers (*Lawrence* v. *Kemp*, 1 Duer [N. Y.], 363; *Guthrie* v. *Jones*, 108 Mass. 191; *Johnson* v. *Wiseman*, 4 Metc. [Ky.] 357), or for platform scales set up in front of a building, and connected with it by a weighing apparatus (*Bliss* v. *Whitney*, 9 Allen, 114), or for an organ in a church set up in a niche built expressly therefor and connected with the building so that its removal defaces the walls (*Rogers* v. *Crow*, 40 Mo. 91), or for trees, growing fruit, crops, shrubbery or any species of vegetation, including nursery trees, not severed from the freehold (*Maples* v. *Millon*, 31 Conn. 598; *Mitchell* v. *Billingsley*, 17 Ala. 391; *Byarse* v. *Reese*, 4 Metc. [Ky.] 372), or for a factory bell, or blow pipe used to convey air to a mill or other building (*Alvord Manufacturing Co.* v. *Gleason*, 36 Conn. 86), or for gin stands (*Richardson* v. *Borden*, 42 Miss. 71; 2 Am. Rep. 575), or for pans or vats attached to a mill (*Prescott* v. *Wells*, 3 Nev. 82), or for a steam saw-mill (*Perkins* v. *Swank*, 43 Miss. 349), or for a pipe used to conduct water to a building, or faucets or any appliance connected therewith for its convenient use (*Philbrick* v. *Ewing*, 97 Mass. 133), or for counters, drawers or shelves in a store (*Pope* v. *Garrard*, 39 Ga. 471), or for a portable grist-mill (*Potter* v. *Cromwell*, 40 N. Y. 287), or for machinery built into a wall (*Coey's Estate*, 1 Tucker [N. Y.], 175), or set in bricks (*Thenurer* v. *Nautre*, 23 La. Ann. 749), or for a heavy stone sink (*Bainway* v. *Cobb*, 99 Mass. 457), or for a windlass in a slaughter-house, annexed thereto (*Capen* v. *Peckham*, 35 Conn. 88), or for the materials of which a building is composed, after it is blown down (*Rogers* v. *Gillinger*, 30 Penn. St. 185), or for the main wheel and gearing in a factory (*Powell* v. *Manufacturing Co.*, 3 Mas. [C. C.] 459), or for an oyster or lunch counter fastened to the floor, or a bar fastened to the floor with nails, and iron knees (*Guthrie* v. *Jones*, 108 Mass. 191), or for an iron safe set in a brick wall, with its foundation laid in brick (*Folger* v. *Kenner*, 24 La. Ann. 436), or indeed for any thing so annexed to the freehold that it cannot be removed without injury thereto (*Richardson* v. *Borden*, 42 Miss. 71; 2 Am. Rep. 595; *Voorhees* v. *McGinnis*, 48 N. Y. 278), even though it was obtained by fraud. *Woodruff Iron Works* v. *Adams*, 37 Conn. 233. But, when any thing that is annexed to the free-

hold, as growing crops, trees, buildings, machinery or other fixtures, are severed therefrom, they become personal property, and from that time, trover lies for their conversion. *Pinkham* v. *Gear*, 3 N. H. 484; *Stone* v. *Proctor*, 2 Chip. (Vt.) 116; *Smith* v. *Benson*, 1 Hill, 176; *Northam* v. *Bowden*, 11 Exch. 70; 32 Eng. L. & Eq. 559; *Bartlett* v. *Hoyt*, 29 N. H. 317; *Sampson* v. *Hammond*, 4 Cal. 184; *Whidden* v. *Seelye*, 40 Me. 247; *Nelson* v. *Burt*, 15 Mass. 204; *Whitfield* v. *Bewit*, 2 P. Wms. 241; *Dare* v. *Hopkins*, 2 Cox, 110. In *Freeman* v. *Underwood*, 66 Me. 229, it was held that a land-owner or his licensee might maintain trover for wild berries that had been sold to the defendant, by trespassers who picked them from his premises. Trover does not lie for property which the plaintiff has purposely intermingled with other similar property belonging to the defendant, etc., that it cannot be distinguished or separated from the common mass; but in such cases the whole mass becomes the property of the person with whose goods it was so intermingled. This principle is well illustrated by Coke, C. J., in *Ward* v. *Eires*, 1 Ro. 133, where he says: "The law is that, if J. T. have a heap of corn, and J. D. will intermingle his corn with the corn of J. T. the latter shall have all the corn, because this was done by J. D. of his own wrong." In *Anonymous*, Poph. 38, Anderson, J., still farther illustrates the principle thus: He said, "If a goldsmith be melting of gold in a pot, and, as he is melting it, I will cast gold of mine into the pot, which is melted altogether with the other gold, I have no remedy for my gold, *but have lost it;* and if a man take my garment, and embroiders it with silk or gold, or the like, I may take back my garment; but if I take the silk from you, and with this, face or embroider my garment, you shall not take my garment for the silk that is in it, but are put to your action for taking the silk from you." See *Bryant* v. *Ware*, 30 Me. 295; *Hesseltine* v. *Stockwell*, id. 237; *Silsbury* v. *McCoon*, 6 Hill, 425. This rule applies only, when the property intermingled is not distinguishable from the common mass. Consequently if A turns his cattle into the pasture of B, and they become mingled with B's cattle, and B refuses to let A have his cattle back again, A may maintain trover for them because the cattle can be identified and distinguished from B's. *Leonard* v. *Belknap*, 47 Vt. 602. Neither does the rule apply where the intermingling is the result of an accident, even though through the negligence of the party claiming to recover (*Vining* v. *Baker*, 53 Me. 544; *Nowlen* v. *Colt*, 6 Hill, 461; *Hill* v. *Robison*, 3 Jones, 501), nor where it is done by the consent of the parties, express or implied; but in the latter instances the parties become tenants in common of the goods. *Nowlen* v. *Colt*, 6 Hill, 461; *Hill* v. *Robinson*, 3 Jones, 501. Neither does

trover lie for property that has been *abandoned* by the plaintiff. Thus, where the plaintiff planted oysters in a navigable stream, where oysters were usually found, it was held that he could not maintain trover for them because, by mingling the oysters with those that were already there, and common property, he must be regarded as having abandoned them, and any person had a right to take them. *Shepard* v. *Leverson*, 2 N. J. L. 391. But, if he had planted his oysters in a part of the stream where other oysters were not to be found, and had in any manner indicated that they were private property, or if he had acquired a prescriptive right to plant oysters there, the rule would be otherwise.

Trover does not lie for property to which the plaintiff's title has never specifically attached. Thus, where ten sacks of salt were bought with the funds of A, and five others with the funds of B, the whole being delivered to B without any marks to distinguish which were A's or which were B's, and B delivered all of them to C, who converted them, it was held that A could not maintain trover against C for the sacks belonging to him, as no specific sacks had ever been set apart as his. *Hill* v. *Robison*, 3 Jones' (N. C.) L. 501. In *Morrill* v. *Goodenow*, 65 Me. 178, it is held that trover will not lie for a note given to suppress a criminal prosecution.

Trover does not lie for a record, such as a justice's judgment, for it is neither goods nor chattels, and the plaintiff has not an exclusive property in it. *Cobb* v. *Cornegay*, 6 Ired. L. 358. Which explains *Hudspeth* v. *Wilson*, 2 Dev. 372, cited *ante*, p. 156, § 8.

## ARTICLE II.

### OF THE CONVERSION.

**Section 1. In general.** In order to maintain an action of trover, the plaintiff must show that the defendant has converted the property, otherwise there can be no recovery. Indeed, conversion of a wrongful character is the *gist* of the action (*Beckley* v. *Howard*, 2 Brev. [S. C.] 94; *Parkerson* v. *Simons*, 2 McMull. [S. C.] 188); and if goods have in fact been converted by one, to the possession of which another is entitled, trover will lie therefor, even though the defendant bought them in good faith of a person whom he believed to be the owner (*Morrill* v. *Moulton*, 40 Vt. 242; *West Jersey Co.* v. *Trenton R. R. Co.*, 32 N. J. L. 517; *Flanders* v. *Colby*, 28 N. H. 34; *Tallman* v. *Turck*, 26 Barb. 167; *Johnson* v. *Powers*, 40 Vt. 611; *Garrard* v. *Pittsburgh, etc., R. R. Co.*, 29 Penn. St. 154; *Taylor* v. *Pope*, 5 Coldw. 413; *Dixon* v. *Caldwell*, 15 Ohio

St. 412; *Cooper* v. *Newman*, 45 N. H. 339); or, although the property was converted by mistake. *Platt* v. *Tuttle*, 23 Conn. 233. Honesty of purpose is not a defense, and can in no measure shield the defendant from liability, except to prevent the giving of punitive damages. Every person is bound at his peril to ascertain in whom the real title of property is vested, and, however much diligence he may exert to that end, he must abide by the consequences of any mistake that he makes in ascertaining. *Gilmore* v. *Newton*, 9 Allen, 171; *Spraight* v. *Hawley*, 39 N. Y. 441; *Harris* v. *Saunders*, 2 Strobh. Eq. (S. C.) 370; *Hotchkiss* v. *Hunt*, 49 Me. 213. Therefore it becomes important to ascertain what acts of a person in reference to property amount to a conversion, which we shall endeavor to do in the following sections.

§ 2. **What is a conversion.** Any use of or intermeddling with a chattel, without the consent of the owner, that deprives him of the custody and benefit thereof, is a conversion (*Reid* v. *Calcock*, 1 N. & M. 592; *Hutchinson* v. *Bobo*, 1 Bailey [S. C.], 546; *Harris* v. *Saunders*, 2 Strobh. Eq. 370; *Neal* v. *Hanson*, 60 Me. 84; *Connah* v. *Hale*, 23 Wend. 462; *Farrar* v. *Chauffetete*, 5 Denio, 527; *Disbrow* v. *Tenbroeck*, 4 E. D. Smith [N. Y.], 397; *Polley* v. *Lenox Iron Works*, 2 Allen, 182; *Coughlin* v. *Ball*, 4 id. 334; *Banfield* v. *Whipple*, 10 id. 27; *Badger* v. *Batavia Paper M'f'g Co.*, 70 Ill. 302; *Stephenson* v. *Feezer*, 55 Ind. 416; *Green* v. *Edick*, 66 Barb. 564); and this is the case, although, in its inception, the defendant's possession was lawful (*Murray* v. *Burling*, 10 Johns. 172; *Hart* v. *Skinner*, 16 Vt. 138; *Manwell* v. *Briggs*, 17 id. 176; *Neal* v. *Hanson*, 60 Me. 84; *Gaze* v. *McMillion*, 7 Port. [Ala.] 279; *Johnson* v. *Whittemore*, 27 Mich. 463; *Rotch* v. *Hawes*, 12 Pick. 136; *Fisher* v. *Kyle*, 27 Mich. 454; *Woodman* v. *Hubbard*, 25 N. H. 67; *Thompson* v. *Rose*, 16 Conn. 71; *Farrand* v. *Hurlbut*, 7 Minn. 477; *Latimer* v. *Wheeler*, 30 Barb. 485; *Norton* v. *Kidder*, 54 Me. 189; *Harvey* v. *Epes*, 12 Gratt. 153; *Jordain* v. *Shireman*, 28 Ind. 136; *Moseley* v. *Wilkinson*, 24 Ala. 411), as when property is lent for one purpose, and used for another, such unauthorized use is a conversion of the property, which renders the bailee liable to the owner in trover, as where a horse is lent to go to a certain place, and without the owner's assent is driven to another. *Fisher* v. *Kyle*, 27 Mich. 454; *Wheelock* v. *Wheelwright*, 5 Mass. 104; *Woodman* v. *Hubbard*, 25 N. H. 67; *Homer* v. *Thwing*, 3 Pick. 492; *Rotch* v. *Hawes*, 12 id. 136; *Moseley* v. *Wilkinson*, 24 Ala. 411; *Fish* v. *Ferris*, 5 Duer, 49; *Disbrow* v. *Tenbroeck* 4 E. D. Smith (N. Y.), 397. The fact that the owner of the horse has received pay for its hire will not defeat the action, but if he has accepted extra com-

pensation for the use of the horse, *with knowledge of the facts*, it is a bar to an action for a conversion of the horse. Id. So where a wagon is lent for one purpose and is used for another, it is treated as a wrongful conversion (*Hart* v. *Skinner*, 16 Vt. 138); or a slave is let to work on a plantation and he is put at work upon a steamboat (*Richardson* v. *Dingle*, 11 Rich. [S. C.] 405); or where property is deposited with a person to be applied to a special purpose, and it is applied by the depositary to another or different one, as, where money is left with a person to be paid to a particular person, or applied upon a particular debt or obligation, or in the purchase of particular property, and the depositary uses it for another purpose, such use is a conversion of the money for which trover will lie (*Norton* v. *Kidder*, 54 Me. 189; *Farrand* v. *Hurlbut*, 7 Minn. 477), so where property is deposited with a person as collateral security for a *particular* debt, if he refuses to deliver it up, when such debt is discharged, but insists upon retaining it as security for another debt due him from the depositor, he is guilty of a wrongful conversion (*Robbins* v. *Packard*, 31 Vt. 570; *Latimer* v. *Wheeler*, 30 Barb. 485), and it makes no difference that the depositary did the act for the benefit of the depositor, or that it really inured to his benefit. *He has no right to use the property for any purpose other than that for which it was left with him, upon any consideration or for any purpose, not even for its preservation.* Thus, where grain was deposited with a warehouseman to be kept subject to the order of the owner, and the warehouseman, finding that insects were making serious inroads upon the grain, sold it at the best price he could get for it in the market, without notice to the owner, and the court held that he was guilty of a wrongful conversion of the grain. *Jordan* v. *Shireman*, 28 Ind. 136. So a sale of goods by one to whom they have been conditionally sold, before the condition is performed, is a wrongful conversion. Thus, where the plaintiff sold the defendant an organ, the title to remain in the plaintiff until paid for, and the defendant parted with his wife and gave her the organ, he was held liable in trover for the organ. *Johnson* v. *Whittemore*, 27 Mich. 463

So, where one received household furniture upon condition that he should not sell or remove it until paid for, a sale by the defendant before the goods were paid for was held a wrongful conversion of the property, although the defendant acted in good faith, and sold the furniture before any demand had been made for it by the plaintiff (*Carter* v. *Kingman*, 103 Mass. 517); and generally, when property is used by a bailee for a purpose other than that for which it was placed in his possession, or when he sells it without authority, the bailment is determined, and he *instanter* becomes liable for its conversion (*Cooper*

v. *Willomatt*, 1 C. B. 672; *Duncan* v. *Stone*, 45 Vt. 118); and the person purchasing the property from him is also liable as for a conversion. Thus, where the plaintiff, at the instance of a person who had authority to bind the owner to that end, put new wheels and axles into a stage wagon and took such person's note therefor, under an express agreement that, until the note was paid, the wheels and axles should remain the property of the plaintiff, and, before the note was paid, the owner took the wagon into his possession and sold it to the defendant, it was held that the defendant was liable in trover to the plaintiff (*Clark* v. *Wells*, 45 Vt. 4; 12 Am. Rep. 187); and any person who takes the property out of the bailee's possession and withholds it from the bailor is liable to him for its conversion, under whatever pretense or authority it is taken, short of the owner's. Thus the plaintiff sold a wagon to one M. for a certain price, upon an express condition that it should remain the plaintiff's property until fully paid for. When only about one-half the purchase-money had been paid, the defendant, as constable, attached the wagon as M.'s property, upon a writ in favor of one of M.'s creditors. The defendant was held chargeable for a conversion of the wagon, and judgment was rendered against him for its value at the time of its attachment. *Duncan* v. *Stone*, 45 Vt. 118. But if the bailor either expressly or impliedly assents to a different use of the property by the bailee, or to its sale by him, he cannot charge the bailee with a wrongful conversion of the property. *Kellogg* v. *Fox*, 45 Vt. 348.

Thus it will be seen that any *abuse* of a possession lawfully acquired, or any breach of the trust under which it was placed in the defendant's hands, is an actionable conversion (*Murray* v. *Burling*, 10 Johns. 172; *Hart* v. *Skinner*, 16 Vt. 148; *Seago* v. *Pomeroy*, 46 Ga. 227; *Miller* v. *Thompson*, 60 Me. 322; *White* v. *Phelps*, 12 N. H. 382; *Chandler* v. *Belden*, 18 Johns. 157; *Stephenson* v. *Feezer*, 55 Ind. 416; *Turner* v. *Ford*, 15 M. & W. 212; *Ball* v. *Liney*, 44 Barb. 505; *Ripley* v. *Dolbier*, 18 Me. 382; *Cooper* v. *Willomatt*, 1 C. B. 672); and any person into whose possession the property goes, who applies it to his own use, and exercises dominion over it, in defiance of the owner's rights, is liable in trover for the property, however innocent he may be of any wrong in acquiring the possession. *Miller* v. *Thompson*, 60 Me. 322; *Clark* v. *Wells*, 45 Vt. 4; 12 Am. Rep. 187. Thus, A conveyed certain personal property to B, and he permitted A to retain it in his possession and use it at a weekly rent, A agreeing to deliver the goods up to B on demand. A sold the goods to the defendant, who was ignorant of B's title. It was held that the defendant, although he acted in good faith in the purchase of the goods,

acquired no title from A, and was liable to B in trover for them. *Cooper* v. *Willomatt*, 1 C. B. 672; *Clark* v. *Wells*, 45 Vt. 4; 12 Am. Rep. 187. A wrongful intent on the part of the defendant is not an essential element of the conversion. It is enough that the true owner has been deprived of his property by the unauthorized act of some person who assumes dominion or control over it. *Boyce* v. *Brockway*, 31 N. Y. 490; *Flanders* v. *Colby*, 28 N. H. 34; *Morrill* v. *Moulton*, 40 Vt. 242; *Johnson* v. *Powers*, id. 611; *Harker* v. *Dement*, 9 Gill (Md.), 7; *Taylor* v. *Pope*, 5 Cold. (Tenn.) 413; *Cooper* v. *Newman*, 45 N. H. 337; *Tallman* v. *Turck*, 26 Barb. 167; *Dixon* v. *Caldwell*, 15 Ohio St. 412; *Garrard* v. *Pittsburgh, etc., R. R. Co.*, 29 Penn. St. 154; *Platt* v. *Tuttle*, 23 Conn. 233; *Gilmore* v. *Newton*, 9 Allen, 171; *Clark* v. *Wells*, 45 Vt. 4; 12 Am. Rep. 187; *West Jersey Co.* v. *Trenton R. R. Co.*, 3 Vroom (N. J.), 517.

In order to constitute a wrongful conversion, it is not necessary that the defendant should have had the actual manual possession of the property, nor that he should have applied it to his own use, it is enough if he has assumed such control over the property, by a possession, actual or constructive, as deprives the owner of his dominion over it for *any* purpose. *Connah* v. *Hale*, 23 Wend. 462; *Bristol* v. *Burt*, 7 Johns. 254; *Murray* v. *Burling*, 10 id. 172; *Reynolds* v. *Shuler*, 5 Cow. 323; *Webber* v. *Davis*, 44 Me. 147. Thus, an officer who attaches property by complying with the provisions of the statute is liable as for a conversion, although the property is left in the possession of the debtor, because, although the owner is not deprived of his possession of the property, yet, his dominion over it for all purposes is thereby curtailed and limited. His right of sale, for the time being, is defeated, and this of itself renders the officer liable in trover, if the attachment or levy is wrongful (*Polley* v. *Lenox Iron Works*, 2 Allen, 182; *Reynolds* v. *Shuler*, 5 Cow. 323; *Bristol* v. *Burt*, 7 Johns. 254); but if an officer attempts to make an attachment, but it is invalid by reason of his failure to comply with the requirements of the statute, or if the debtor procures a third person to receipt the property, he is not chargeable with a conversion. *Fernald* v. *Chase*, 37 Me. 289; *Rand* v. *Sargent*, 23 id. 326.

If a person has the property of another upon his premises, and *forbids* its removal, as where machinery belonging to one is in the building of another, he is chargeable for a conversion of the property, because the defendant, being the owner of the premises, the plaintiff had no right to enter thereon, against his positive orders to the contrary. Besides, the courts hold that a very slight interference with or control over the property of another, to the exclusion of the owner, amounts to a con-

version. *Farrar* v. *Chauffetete*, 5 Denio, 527; *Delano* v. *Curtis*, 7 Allen, 470. But in such a case, if it does not appear that the defendant has personally in any way intermeddled with the property, and the refusal relied upon to establish a conversion was given by an agent in answer to a demand which embraced property not belonging to the plaintiff, it is for the jury to say whether this was such a clear and absolute refusal to deliver the property to which the plaintiff was entitled to, as to amount to a conversion. *Delano* v. *Curtis*, 7 Allen, 470. Where the defendant forbade the plaintiff from entering upon his (the defendant's) premises to take away a quantity of cord wood belonging to him that was lying there, and claimed the wood as his own, it was held a conversion by the defendant. *Woodis* v. *Jordan*, 62 Me. 490. So, where logs of the plaintiff are lying upon the land of the defendant and the former goes to take them away, but the latter forbids him from doing so and threatens to sue him if he does, and the defendant afterward sells a part of the logs, this will amount to a conversion of all the logs by the defendant. *Sherman* v. *Way*, 56 Barb. 188. So, if the owner or occupant of a house refuses to permit a person who has property there to enter to take it away, it is a conversion. *Walker* v. *Clyde*, 10 C. B. (N. S.) 381. But the owner of premises upon which another has property cannot be charged with a conversion thereof, simply because he does not deliver it to the owner on demand, provided he does not set up title in himself to the property, or forbid or prevent the owner from entering to take it away. A conversion cannot be predicated of the fact that he does not aid the owner in taking away his property, or actually deliver it to him, and this is the case, even though the property is in a building belonging to the defendant, and since the property was placed there, he had put new locks upon the doors, and kept them constantly locked (*Poor* v. *Dankham*, 102 Mass. 309), and in the case of heavy and bulky goods, the owner is bound to take them where they are, and cannot insist that the person having them in his possession shall deliver them to him at some other place. Thus, where a trip hammer and other cumbrous machinery was attached by an officer, in the shop where they were used, and bailed to the defendant, with the understanding that they might be used by him, and the officer subsequently, in the street, but near the shop, demanded the property of the defendant, and the defendant offered to go to the shop with him and deliver the property to him, but the officer neither went with the plaintiff, or designated any other place for their delivery, it was held that the shop was the proper place of delivery, and that, under these circumstances, there was no conversion of the property by the defendant. *Durgin* v. *Gage*, 40 N. H. 302. The assertion of a

claim of title to, or preventing the removal of property upon one's premises by the real owner, amounts to a conversion (*Crocket* v. *Beaty*, 8 Humph. [Tenn.] 20); and it seems that, where a building, or other erections are made upon premises by a lessee or other person, under a license, express or implied, and the owner of the lands enjoins the tenant or licensee from removing them within the life of the lease or license, and then, before the injunction is dissolved, *sells* the premises, he, by such sale, is guilty of a conversion, and the value of the erections may be recovered from him (*Bircher* v. *Parker*, 43 Mo. 443); and generally, when a building or other erection has been made upon lands by a person, under such circumstances, if the owner forbids the tenant or licensee from entering to take it away, he is chargeable for a conversion of them. *Pullen* v. *Bell*, 40 Me. 314; *Parker* v. *Goddard*, 39 id. 144; *Dame* v. *Dame*, 38 N. H. 429; *Hinckly* v. *Baxter*, 13 Allen, 137; *Adams* v. *Goddard*, 48 Me. 212; *Davis* v. *Taylor*, 41 Ill. 405; *Overton* v. *Williston*, 31 Penn. St. 155; *Crippen* v. *Morrison*, 13 Mich. 23.

Where a person comes lawfully into the possession of property, or even innocently, through a person who had no title thereto, he cannot be charged with a conversion of the property, simply because he claimed it, or dealt with it as his own, nor even will an offer to sell it have that effect; for a person coming innocently into the possession of property by purchase from one who had no title thereto, may very properly assert ownership therein, or assume dominion and control over it. It is only an assertion of ownership made in, or an exercise of dominion and control over property, after it has been demanded by the real owner, that transforms his possession from a rightful to a wrongful character. The rule, as gathered from the cases, is, that in such cases, in order to make a person guilty of a wrongful conversion of property, there must be an illegal assumption of ownership, *with knowledge of the real owner's title thereto, or a claim of title in defiance thereof.* *Nelson* v. *Whetmore*, 1 Rich. (S. C.) 318; *Beckley* v. *Howard*, 2 Brev. (S. C.) 94. But this is only true in that class of cases where a demand would be necessary to fix the defendant's liability. In all such cases, unless there has been a misuse of the property, the defendant cannot be charged as for a conversion until after a demand, and a refusal to deliver. *Parker* v. *Middlebrook*, 24 Conn. 207; *Carter* v. *Kingman*, 103 Mass. 517; *Clark* v. *Ridout*, 39 N. H. 238; *Lee* v. *McKay*, 3 Ired. (N. C.) 29. If, however, an innocent purchaser of goods, that may belong to another, has sold them, and they are carried beyond the owner's reach, this is a conversion in fact, for which an action lies. Every absolute sale of property implies ownership in the vendor, and is a conversion, however made, or

whether by a private person or an officer. *Harris* v. *Saunders*, 2 Strobh. (S. C.) 370; *Webber* v. *Davis*, 44 Me. 147. Even where a person does not claim title to goods, yet, if he exercises dominion over them, and threatens to sue the owner if he takes them away, although he puts no other obstacle in the way of their removal by him, he is guilty of a conversion (*Hare* v. *Pearson*, 4 Ired. 76); or if he refuses to deliver them up, or to permit the owner to take them (*Morris* v. *Thompson*, 1 Rich. [S. C.] 65); but, if he simply asks for time to ascertain whether he ought to deliver the property, and neither refuses or assents to let the owner have it, he cannot be charged with a conversion, unless after the lapse of a reasonable time he refuses to give it up. *Carroll* v. *Mix*, 51 Barb. 212; *Dowd* v. *Wadsworth*, 2 Dev. (N. C.) 130; *Sargent* v. *Gile*, 8 N. H. 325; *Blankenship* v. *Berry*, 28 Tex. 448.

Where a person sells property then being in a building owned or occupied by him, but retains possession of it for a special purpose, and afterward, while the property is still there, sells the building and contents to A, with notice of the previous sale of the property, the first vendee may maintain trover against A, for a subsequent sale of the property, even without demand first made therefor (*Wooster* v. *Sherwood*, 25 N. Y. 278); but he could not be held chargeable, if he did not set up title in himself, simply because he refuses to deliver the property to the plaintiff at any other place than where it then is, if he offers no obstacles to the plaintiff's taking it. *Wilde* v. *Waters*, 16 C. B. 637; 32 Eng. L. & Eq. 422.

The destruction of property, or changing its character, amounts to a conversion, as if a carrier's servants while transporting a cask of wine or other liquors adulterate it, it is a conversion of all the wine by the carrier (*Dench* v. *Walker*, 14 Mass. 500), or if a person having an engraving, drawing or painting belonging to another in his possession should obliterate any portion of it, or should add any thing thereto, it would be an actionable conversion, and in all cases, when a person changes the character of property, the owner, if he elects to do so, may treat it as a conversion and recover the value of the article, or he may take back the article and sue for the damages. Thus, when a person takes the property of another and uses it to manufacture an article, as a boat, the owner of the materials may lawfully take the boat, unless his materials have been blended with materials belonging to others, in its construction. *Burris* v. *Johnson*, 1 J. J. Marsh. (Ky.) 196. And generally, it makes no difference what change of form property has undergone if the owner can identify it in its new form, he may take it, or he may treat its use as a conversion and recover for the materials. *Parker* v. *Walrod*, 13 Wend. 296; *Betts* v. *Lee*, 5 Johns. 348; *Cur-*

*tis* v. *Groat*, 6 id. 168; *Riddle* v. *Driver*, 12 Ala. 590. Cutting growing crops (*Nelson* v. *Burt*, 15 Mass. 204), or standing trees (*Whidden* v. *Seelye*, 40 Me. 247), or digging ores or minerals from the earth and carrying them away, is a conver sion (*Forsyth* v. *Wells*, 41 Penn. St. 291; *Sampson* v. *Hammond*, 4 Cal. 184), or digging up loads of earth and removing them from the premises. *Riley* v. *Boston Water Power Co.*, 11 Cush. 11. And generally, the severance of any thing annexed to the freehold is a conversion. *Pinkham* v. *Gear*, 3 N. H. 484; *Stone* v. *Proctor*, 2 Chip. (Vt.) 116; *Fay* v. *Muzzey*, 13 Gray, 53.

The very act of assuming to one's self the property and right of disposing of another man's goods is a conversion. *Webber* v. *Davis*, 44 Me. 147; *Baldwin* v. *Cole*, 6 Mod. 212. The unauthorized transfer, by the secretary of an incorporated insurance company, of promissory notes and bills of exchange belonging to the company, is a conversion, for which trover may be maintained. *Firemen's Ins. Co.* v. *Cochran*, 27 Ala. 228. Such conversion may, however, be waived by a subsequent ratification of the transaction, by the company, with full knowledge of all the facts, and the ratification may be either express or implied. Id. If a person takes an assignment of property from one who has no title thereto, and thereby acquires a right over it that hinders or prevents the real owner from getting possession of it, he is guilty of a conversion although the property has never in fact been in his possession. *McCombie* v. *Davies*, 6 East, 538. Thus, in the case last cited, the defendant advanced money to a broker, upon a quantity of tobacco in the king's warehouse, taking an assignment from him of the tobacco, and having it transferred to his own name. The broker, in fact, bought the tobacco for the plaintiff, but the defendant had no knowledge of the transaction, and his dealings with the broker were *bona fide*, under the belief that he owned the tobacco, and it stood in the broker's name in the warehouse, being so entered by the broker, without the plaintiff's knowledge. By a regulation of the warehouse property therein could only be removed by the person in whose name it was warehoused. Upon application being made to the defendant by the plaintiff for the tobacco, he declined to deliver except upon the broker's order and the payment of his advances. The court held that this constituted a conversion, although, in fact, the defendant had never had the tobacco in his possession, because, by the assignment, he controlled its delivery from the warehouse. But the taking of an assignment of, or mortgage upon property, from one who had no title therein, when the assignee or mortgagee has not the possession, actual or constructive, of the property, is not a conversion, because, although the

assignment or mortgage is operative as against the maker, yet it confers no title or lien as against the true owner, and does not operate to hinder or prevent the owner from obtaining possession of his property. But if the assignee or the mortgagee should attempt to control the property, and should prevent the owner from taking it, he would be guilty of a conversion. *Davis* v. *Buffum*, 51 Me. 160. See *Rand* v. *Sargent*, 23 id. 326; *Bristol* v. *Burt*, 7 Johns. 254; *Phillips* v. *Hall*, 8 Wend. 610.

If a person converts a part of property that is in a mass, or that destroys the unity of the whole, or that impairs the use or value of other property with which it is connected, it operates as a conversion of the whole. Thus, where a person having possession thereof, as a carrier or bailee, consumes or takes a part of a cask of wine, it is a conversion of the whole, if the owner so elects to treat it. *Phillpott* v. *Kelley*, 3 Ad. & El. 106; *Richardson* v. *Atkinson*, 1 Strange, 576. "A conversion of part," says Patteson, J., in the case first above cited, "may, as *against* the wrong-doer, be a conversion of the whole, but it does not follow that he may set it up as such." In an English case (*Clendon* v. *Dinneford*, 5 C. & P. 13), this question arose where the defendant had in his possession some letters and *two* books belonging to the plaintiff. The defendant, upon demand, gave up the letters and *one* book, which the plaintiff accepted, and the court held that, while the retention of the other book operated as a conversion of the whole, yet, as the plaintiff had accepted *part* of the property, damages could only be given for that retained by the defendant. Thus it will be seen that a conversion of a part of certain property in the defendant's possession may, at the election of the plaintiff, be treated as a conversion of the whole, and he is not bound to take back a part of it, but if he does accept a part, damages can only be given for the part converted. In *Bowen* v. *Fenner*, 40 Barb. 383, the defendant sent for the plaintiff to do his threshing, and the plaintiff brought his machine into the defendant's barn for that purpose, upon wheels which he had borrowed. The defendant then claimed the wheels, but said the *machine* might be taken away. The jury found that the defendant had no right to retain the wheels, and as the plaintiff declined to take the machine without the wheels, it was held that this was a conversion of the machine also. So, in *Sherman* v. *Way*, 56 Barb. 188, the owner of land felled certain timber and sold it to the plaintiff, without requiring him to remove it, immediately, and subsequently, before the timber had been removed, sold the land to the defendant, with notice of the sale of the timber to the plaintiff, and the defendant refused to permit the plaintiff to remove it, and afterward sold a part of it. The court held that a conversion

of a part of the timber was a conversion of the whole. See, also, *Featherstonehaugh* v. *Johnston*, 2 Moore, 181. If a person, who has the custody of the goods of another, puts them into the hands of a third person without the owner's assent, it is a conversion of the goods by both. Thus, where the owner of a store left it in charge of a person with no authority to dispose of the goods other than as an ordinary salesman, and not returning at the time appointed, the bailee permitted the alleged creditor of the plaintiff to enter without process and sell out the stock, and close out the concern, it was held a tortious conversion by such third person. *Bane* v. *Dettrick*, 52 Ill. 19. So, where the payee of a promissory note, who had received certain obligations from the maker, as collateral security for the payment of the note, and, without authority from the maker of the note, exchanged the collaterals with the maker thereof, for the note of the maker of the collaterals, it was held a conversion, that rendered the defendant liable to the maker of the note for the full nominal value of such collaterals. *Greenwald* v. *Metcalf*, 28 Iowa, 363; *Robson* v. *Rolls*, 9 Bing. 648. See, also, to same effect, where the creditor refused to return the collaterals when the debt was canceled. *Abrahams* v. *Southwestern Bank*, 1 S. C. 441; 7 Am. Rep. 33.

Where a person receives property, as a horse, to keep, and he has a lien thereon for such keep, but he uses the property enough to compensate him therefor, if he refuses to deliver the property upon demand by the owner, until he is paid for the keep, he is guilty of a conversion of the property (*Alvord* v. *Davenport*, 43 Vt. 30), and generally, when a person has a lien upon property, and he refuses to deliver it up on payment of the lien (*Lamotte* v. *Archer*, 4 E. D. Smith [N. Y.], 46); or, if he attempts to sell the property before it has become forfeited for non-payment of the lien (*Vincent* v. *Conklin*, 1 E. D. Smith [N. Y.], 203); or if he claims more than he is entitled to, or if he bases his refusal to deliver upon another ground than that of the lien, he forfeits his lien and is guilty of a conversion of the property without payment or an offer to pay the amount of the lien by the owner. *Boardman* v. *Sill*, 1 Camp. 410 *n*. Thus, where A had goods in pawn, delivered his receipt to B to take them out of pledge; which B did, and subsequently upon A's sending for the goods, B said that he had not got them and refused to tell where they were, it was held that he was guilty of a conversion of the goods, and could not insist upon a tender of the money he had advanced to get them out of pledge. *Jones* v. *Cliffe*, 3 Tyrw. 576. See, also, *Thompson* v. *Trail*, 2 C. & P. 334; *Smith* v. *Young*, 1 Camp. 439. So where the lien asserted is unlawful, the bailee is liable for a conversion. Thus, where the plain-

tiff delivered his note to B to procure a discount for him, and took B's post-dated checks for the amount, which were never paid, and B pledged the note to the defendant to secure a usurious loan, the defendant sold the note before it was demanded of him by the plaintiff. The court held that B had no lien upon the note for the return of the checks, or if he ever had, that he had forfeited it by his misappropriation of the note, and that the plaintiff was entitled to maintain trover for the note against the defendant without showing any offer to return the checks to B. *Keutgen* v. *Parks*, 2 Sandf. 60. The collection of a note by one not entitled to it is evidence of a conversion, and renders a demand unnecessary. *Donnell* v. *Thompson*, 13 Ala. 440. Possession of a note is *prima facie* evidence of ownership in an action of trover against one who shows no title to it. Id.

Except where by contract or usage a lien arises, a person, having the custody of the goods of another, cannot hold them until a certain indebtedness to him is discharged, and a refusal by him, to deliver up the goods until a certain debt owing by the owner to him is paid, is an actionable conversion. *Sharp* v. *Pratt*, 3 C. & P. 34.

The misdelivery of goods by a carrier is a conversion thereof (*Bowlin* v. *Nye*, 10 Cush. 416; *Devereux* v. *Barclay*, 2 B. & Ald. 702; *Stephenson* v. *Hart*, 4 Bing. 476); so is a refusal to deliver goods on demand upon payment of freight (*Dwight* v. *Brewster*, 1 Pick. 53); or a refusal to deliver until certain charges are paid for which no lien existed (*Wilson* v. *Anderton*, 1 B. & Ald. 450); or if he deliver the goods to another person under a mistaken idea that such person has a lien upon them. *Syeds* v. *Hay*, 4 T. R. 260. But a carrier cannot be charged with the conversion of goods because he has negligently dealt with them whereby they were stolen or lost (*Bowlin* v. *Nye*, 10 Cush. 416; *Ross* v. *Johnson*, 5 Burr, 2825), at least when there is no actual wrong on his part (*Kirkman* v. *Hargeraves*, 1 Selw. N. P. 425); nor because of delay on his part in delivering goods. *Briggs* v. *N. Y. Cent. R. R. Co.*, 28 Barb. 515. He is not bound to deliver until demand is made therefor. *Robinson* v. *Austin*, 2 Gray, 564. But if he sells the goods, or uses or destroys them, he is answerable for their conversion. *Chandler* v. *Belden*, 18 Johns. 157.

If goods are placed in the hands of a person to be sold for the benefit of the owner upon certain terms, and he places them in the hands of another person to be sold upon the *same* terms, he is liable as for their conversion (*Moffat* v. *Wood*, Seld. Notes [N. Y. Ct. of Appeals], No. 5, 14); and the reason for this is, that the act of the bailee is not authorized, and his dealing with the property is an unwarrantable interference with the owner's dominion over it. Without pursuing this

matter further, it will be seen that any unauthorized or unwarrantable interference with the property of another which, *in any measure*, restricts or interferes with the owner's dominion or control over it, is a conversion of the property, which renders the person guilty of such interference liable for the value of the property at the time of conversion, under whatever pretense, short of the authority from the owner, or the authority of a valid legal process, the act was done. *Murray* v. *Burling*, 10 Johns. 172; *Bristol* v. *Burt*, 7 id. 254; *Connah* v. *Hale*, 23 Wend. 462; *Burton* v. *Hughes*, 2 Bing. 173. If a sheriff sells more goods than are necessary to satisfy an execution, he is liable for a conversion in respect to the excess (*Aldred* v. *Constable*, 6 Q. B. 381); and so is a landlord who distrains and sells more goods than are necessary to satisfy the rent in arrear, but the mere seizure of more goods than are necessary to satisfy an execution or a distress, if the surplus is seasonably returned after the sale, is not a conversion. *Evans* v. *Wright*, 2 H. & N. 527.

Every person who aids in the act of conversion is responsible for the entire damage resulting therefrom, although he acted merely as the friend of another who was the real principal in the transaction, or that he was acting as the servant of another and in obedience to his commands. *Yost* v. *Stout*, 4 Cold. 205; *Stephens* v. *Elwall*, 4 M. & S. 261; *Parker* v. *Godin*, 2 Str. 813. It is never an answer to an action for a wrongful conversion, that the act alleged to operate as a conversion was done by the command of another, and that he had the property. But in all such cases the servant and master, either or both, are liable for the conversion. *Schuster* v. *McKellar*, 7 El. & Bl. 704; *Perkins* v. *Smith*, 1 Wils. 328; *Greenway* v. *Fisher*, 1 C. & P. 190; *Ewbank* v. *Nutting*, 7 C. B. 808. Thus, where the servant of a person having the property of another in his possession refuses to give it up to the owner on demand, it is treated as a conversion by the master. *Jones* v. *Hart*, 2 Salk. 441; *Delano* v. *Curtis*, 7 Allen, 470. So where goods are converted by the wife, both she and her husband may be joined in an action therefor. *Catterall* v. *Kenyon*, 3 Q. B. 310; *Keyworth* v. *Hill*, 3 B. & Ald. 688. Obtaining property from a person by duress or fraud is a conversion of the goods (*Powell* v. *Hoyland*, 6 Exch. 67; *Thompson* v. *Rose*, 16 Conn. 71); as where property is purchased by one with a preconceived design not to pay for it, he is guilty of a fraud, and is liable to the vendor in trover for the goods. *Ayres* v. *French*, 41 Conn. 153; *Ferguson* v. *Carrington*, 9 B. & C. 59; *Noble* v. *Adams*, 7 Taunt. 59; *Hall* v. *Naylor*, 18 N. Y. 588; *Dow* v. *Sanborn*, 3 Allen, 181; *Read* v. *Hutchinson*, 3 Camp. 352; *Bristol* v. *Wilsmore*, 1 B. & C. 514; *Kilby* v. *Wilson*, Ry. & Moo. 178. But if

the vendee has sold the goods to an innocent purchaser, the purchaser from him, without any knowledge or notice of the fraud, cannot be charged with a conversion of the goods. *Williamson* v. *Russell*, 39 Conn. 406. "If this were not so," says JERVIS, C. J., in *White* v. *Garden*, 10 C. B. 927, "goods at all tainted with fraud might be followed through any number of *bona fide* purchasers— a most inconvenient and absurd doctrine; for a vendor who does not choose to avail himself of means of inquiry would thus, by trusting the vendee, be giving him unlimited means of defrauding the rest of the world," *Sheppard* v. *Shoolbred*, Carr. & M. 63. In such a case the sale is void, only at the election of the vendor, and it is too late to declare such an election after the goods have passed into the hands of a *bona fide* purchaser. *White* v. *Garden*, 10 C. B. 927. But, where the relation of vendor and vendee does not exist, and the person obtaining the goods acquires *no title* thereto, he can transmit none, consequently a sale by him places his vendee in no better position than himself, however innocent the transaction may have been on his part, and if he re-sells the goods or refuses to deliver them up to the true owner, he is chargeable with their conversion. *Higgons* v. *Burton*, 26 L. J. Exch. 342. Thus in *Boyson* v. *Coles*, 6 M. & S. 14, the plaintiffs, having some guns for sale, warehoused them in their name at the London Docks, received from a broker a sold note, not disclosing the name of any purchaser, and gave C. an order on the docks for the weighing and transfer of the guns to his order, and sent him an invoice as for guns bought of them by C. and, having called upon him to sell the guns as per contract, drew on H. for the price, which bills were accepted by H. and guaranteed by C. who afterward, for a valuable consideration, pledged the guns to the defendant, handing over to him the transfer order of the plaintiffs, together with a transfer order from himself, and afterward, and before the bills became due, became a bankrupt, and the court held that the plaintiffs were entitled to maintain trover against the defendant for the guns. This case established two propositions: 1st, that a factor cannot pledge unless the owner arms him with such indicia of ownership, as enables him to deal with the property as his own, and 2d, that, where the relation of vendor and vendee does not exist between the owner and vendor, or pawner of the property, the vendee or pawnee has no title as against the owner. See, also, similar in the facts and in principle, *Kingsford* v. *Merry*, 1 H. & N. 503. Mere possession is not proof of property, and a person buys property of one who has it in his possession at his peril. *Williams* v. *Barton*, 3 Bing. 139.

A purchaser acquires no title to property that was stolen, though he

bought it in good faith at a public auction, and either he or the auctioneer, or both, are liable for its conversion (*Hoffman* v. *Carow*, 22 Wend. 285), and generally, where the vendor had *no* title to the property, his vendee acquires none and is liable in trover to the true owner, even without a demand being first made upon him for the property. *Wells* v. *Ragland*, 1 Swan. 501; *Forster* v. *Smith*, 2 Cold. 474; *Rice* v. *Clark*, 8 Vt. 109; *Mulligan* v. *Bailey*, 28 Ga. 507; *Ladd* v. *Moore*, 3 Sandf. 589. If a person without authority enters upon the land of another, and raises crops, and carries them away, he is chargeable for a conversion of the crops. *Simpkins* v. *Rogers*, 15 Ill. 397. Thus, where the plaintiff was forcibly expelled from a farm of which he was the owner, and the premises were leased by one of the parties expelling him, to the defendant, who went on to the premises and raised crops and cut and carried them away, the plaintiff subsequently recovering the premises in an action for forcible entry and detainer, it was held that the defendant was liable to him in trover for a conversion of the crops. *Thomes* v. *Moody*, 11 Me. 139. But see *Brothers* v. *Hurdle*, 10 Ired. 490, where it was held that a demandant in ejectment could not maintain trover for crops raised and carried away before the writ of possession was executed.

If a person agrees to exchange certain property with another, giving him certain property for certain property of the other, and, after getting the other's property into his possession, refuses to deliver to him the property that he agreed to give in exchange, he is liable for a conversion of the property so received by him. Thus, where A delivered to B, a mare, for which the defendant agreed to give him two acres of certain land and five dollars in money, but, after receiving the mare, he refused to give a deed of the land, and he was held liable for a conversion of the mare. *Waters* v. *Van Winkle*, 3 N. J. L. 567. See, also, *Hall* v. *Robinson*, 2 N. Y. 293.

The transfer of a negotiable security, which the defendant was not authorized to make, is a conversion thereof (*Fireman's Ins. Co.* v. *Cochran*, 27 Ala. 228), as, where the payee thereof transfers a negotiable note or other security which the maker was entitled to have delivered up to him, he is liable to the maker for a conversion of the note. *Buck* v. *Kent*, 3 Vt. 99.

If property is given in exchange for notes or other securities that are void in their inception, for usury, it may be recovered for in trover, upon discovery of the invalidity of the securities, if they were taken on the representation of the defendant that they were regular business notes, when the defendant did not know whether they were such or not; and an action will lie for the conversion of the property, even

though the parties acted in good faith, both supposing that the securities were valid. *Loeschigh* v. *Blun*, 1 Daly (N. Y.), 49.

Where property is placed on board a vessel for transportation, an unjustifiable refusal by the master to either proceed upon the voyage, or to deliver the property, amounts to a conversion of it (*Portland Bank* v. *Stubbs*, 6 Mass. 422), and this rule would doubtless apply equally to all carriers.

Generally, it may be said that any wrongful or illegal assumption of ownership or control over the property of another, or any misuse or abuse of such property, though lawfully in the defendant's possession, or a wrongful detention thereof after demand made therefor, amounts to an actionable conversion of the property. *St. John* v. *O'Connel*, 7 Port. (Ala.) 466; *Clark* v. *Whitaker*, 19 Conn. 319; *Sanderson* v. *Haverstick*, 8 Penn. St. 294. To summarize, any assertion of title to, or control over property, that is not consistent with the owner's right, is a conversion, and particularly is this the case, when the person asserting such title sells the property (*Carter* v. *Kingman*, 103 Mass. 517; *Gilman* v. *Hill*, 36 N. H. 311; *Webber* v. *Davis*, 44 Me. 147), under whatever pretense made (*Grainger* v. *Hill*, 4 Bing. N. C. 221), and the person who purchases the property is equally as chargeable for the conversion as the seller if he sells or disposes of the property, or refuses to deliver it to the owner after a lawful demand made by him (*Clark* v. *Wilson*, 103 Mass. 219; 4 Am. Rep. 532; *Hyde* v. *Noble*, 13 N. H. 494); and so of any person aiding or abetting the same *Billiter* v. *Young*, 6 El. & Bl. 1. And this rule applies equally to the sale of a part of an article. *Gentry* v. *Madden*, 3 Pike (Ark.), 127; *Bowen* v. *Fenner*, 40 Barb. 383. If a person pledges the property of another without authority (*Thrall* v. *Lathrop*, 30 Vt. 307; *Carpenter* v. *Hale*, 8 Gray, 157), or having it with authority to sell for cash, sells it and takes a note, or exchanges it for other property (*Haas* v. *Damon*, 9 Iowa, 589), or uses it for another purpose (*Spencer* v. *Pilcher*, 8 Leigh [Va.], 565; *Fisher* v. *Kyle*, 27 Mich. 454; *Crocker* v. *Gullifer*, 44 Me. 491), and, generally, any unauthorized act of dominion over the property that is inconsistent with the owner's rights, is a conversion. *Pease* v. *Smith*, 61 N. Y. 477; *Foulkes* v. *Willoughby*, 8 M. & W. 540; *Hollins* v. *Fowler*, 7 L. R. H. L. Cas. 757; *Hiort* v. *Bott*, L. R., 9 Exch. 86; 8 Eng. Rep. 529; *Boyce* v. *Brockway*, 31 N. Y. 490; *Connah* v. *Hale*, 23 Wend. 462.

A, being indebted to B, in a certain sum, delivered to the latter, as security for the payment of such debt, a promissory note secured by a chattel mortgage, held by A against C, for a sum exceeding the amount of such debt; C, with a knowledge of the nature of B's title to such

note, having paid him thereon a sum equal to such debt, the latter surrendered such note and released such mortgage to C, who destroyed them, whereupon A brought suit against both for conversion,—and it was held that B and C had unlawfully converted such instruments, and were jointly liable therefor to A. *Stephenson* v. *Feezer*, 55 Ind. 416.

But, as the conversion must be wrongful, if the defendant delivers it up, upon demand, he cannot be charged for damages in trover (*Chandler* v. *Partin*, 2 Treadw. [S. C.] 72; *Quay* v. *McNinch*, 2 id. 78), nor can a defendant be charged with a conversion *after* suit brought, unless a conversion is shown to have transpired *before* the action was instituted, the action must fail. *Storm* v. *Livingston*, 6 Johns. 44. As to when a demand and refusal operates to establish a conversion, see Art. 3, *post*, pp. 205, 211. An unlawful levy upon goods under a void attachment is such a wrongful taking and conversion as will sustain an action of trover. *Jones* v. *Buzzard*, 2 Ark. 415.

§ 3. **What is not a conversion.** A conversion is a positive tortious act. Mere *nonfeasance* or neglect of some legal duty will not support an action of trover, although it might be a sufficient ground for an action on the case. *Sturgis* v. *Keith*, 57 Ill. 451; 11 Am. Rep. 28. A mere claim of ownership of personal property, where no obstacle is put by the defendant in the way of the removal of it by the owner, is not a conversion of the property. *Hewett* v. *Sessions*, 119 Mass. 221. A mere wrongful interference with property does not necessarily amount to a conversion (*Corning* v. *Elliott*, 10 La. Ann. 753); nor does a mere asportation thereof, unless the taking or detention is with intent to convert it to the taker's own use, or that of some third person, or, unless the act done has the effect either of destroying or changing the quality of the property, or of depriving the owner of his dominion or control over it (*Fouldes* v. *Willoughby*, 8 M. & W. 540); nor even in the latter instance, if the act was in the first instance lawful, and it does not appear that the owner could not have had the property if he had desired it. *Needham* v. *Rawbone*, 6 Q. B. 771 *n*. Thus, in the case last cited, the plaintiff brought an action for a lot of wearing apparel. It appeared that the plaintiff had left his house, and in it, the articles for which the action was brought. The defendant entered the premises, as he claimed, under authority from the court of chancery, placed a man in charge of the house, took an inventory of the goods, and locked up the rooms containing them, and prevented the plaintiff's servants from having access thereto, and finally expelled them from the house, leaving the property under the defendant's control. It was held that this did not constitute

a conversion, because, as Lord DENMAN said, "it did not appear that he (the plaintiff) might not have had the use of the goods, if he had desired it." In a later English case (*Thorogood* v. *Robinson*, 6 Q. B. 769), where the plaintiff had a quantity of lime which he had burnt in kilns from chalk dug upon the premises, and the plaintiff, having recovered in ejectment, entered upon the premises under a writ of possession and turned the plaintiff's servants off the land, and would not allow them to remain for the purpose of removing the goods there, the court held that, in the absence of any assertion of ownership in the goods by the defendant, or of a subsequent demand therefor, and refusal by the defendant, he could not be charged with a conversion of the goods. COLERIDGE, J., in passing upon the question, said, "Neither the plaintiff nor his servant had any right to be upon the land; nor was the defendant bound to allow them to remain there for the purpose of removing the plaintiff's goods. What he was bound to do was, on demand to let the plaintiff remove the goods; or to remove them himself to some convenient place for the plaintiff." But, where the original act is unlawful, any act, taking from the owner, even the temporary possession of his goods, is a conversion. *Keyworth* v. *Hill*, 3 B. & Ald. 688; 3 Stark. Ev. 1156; *Baldwin* v. *Cole*, 6 Mod. 212. Castrating a scrub hog running among other hogs is not such proof of a change of property as to be evidence of a conversion or appropriation of the hog by a party, to his own use. *Byrne* v. *Stout*, 15 Ill. 180. See *Norris* v. *Banta*, 21 Tex. 427; *Custard* v. *Burnett*, 15 id. 456. *Ante*, p. 97, tit. *Trespass*.

Neither does the destruction of goods necessarily amount to a conversion. In order to have that effect, it must appear that the destruction was willful, or the result of an intention on the part of the defendant of depriving the plaintiff of the possession or use of them. If it merely resulted from the doing of an act which the defendant had a right to do, and without any intention on his part, needlessly or wantonly to destroy the property, he cannot be charged with a conversion. Thus, if a person leaves a wagon standing upon my premises, without my consent and I draw it out upon the highway, and leave it standing there, and it is stolen, I am not guilty of a conversion of the wagon, for I had a right to remove it from my premises, and even though it was destroyed, unintentionally, while being removed by me, the rule is not changed. Thus, where a person left timber lying upon the premises of A, and A, while engaged in digging a sawpit thereon, cut through the timber and left the pieces lying there, and they were accidentally washed away into the river and lost, it was held that A was not chargeable with the conversion of the timber, and this would have been the rule

even though the sawpit had been made without any intention or expectation on the part of A, that it would ever be of any use to him (*Simmons* v. *Lillystone*, 8 Exch. 442), because, as observed by PARKE, B., in the case last referred to, "A had a perfect right to make a sawpit on his own property. If in truth he chose to make a hole in the soil for any purpose whatever — for the purpose is immaterial, the land being his own — and if he could not remove the timber which was wrongfully placed there, without cutting it, he would be justified in doing so, and his intention of making a sawpit is therefore immaterial. *Plumer* v. *Brown*, 8 Metc. (Mass.) 578. So, where cattle are trespassing upon the premises of another, merely turning them into the highway, whereby they are lost, does not make the owner of the premises chargeable for their conversion. *Stevens* v. *Curtis*, 18 Pick. 227; *Nelson* v. *Merriam*, 4 id. 249. *Ante*, Vol. 1, p. 322.

In this form of action, *intention*, either express, or such as arises from necessary inference, may be material, and, where a trespass is limited to a mere injury to property, and does not extend to the right of the owner, or tends directly to deprive him of its ultimate enjoyment, as well as of its immediate possession, it cannot be tortured into a conversion for which trover will lie. "An interference with property," says the court, in *Nelson* v. *Whetmore*, 1 Rich. (S. C.) 318, "under circumstances that show the owner's right to be undisputed, even with injurious consequences to the owner, does not amount to a conversion." *Sparks* v. *Purdy*, 11 Mo. 219; *Strickland* v. *Barrett*, 20 Pick. 415; *Wellington* v. *Wentworth*, 8 Metc. 548; *Nelson* v. *Whitman*, 1 Rich. 318. But, if there is a detention of the property from the owner, intended to operate as a denial of his right, or as the assertion of an adverse title, it is a conversion, however brief the period of its continuance. *Sargent* v. *Gile*, 8 N. H. 325; *Calkins* v. *Lockwood*, 17 Conn. 154; *Liptrot* v. *Holmes*, 1 Kelley, 381; *Keyworth* v. *Hill*, 3 B. & Ald. 688.

The accidental destruction of property by one to whom it was lent does not amount to a conversion. Thus, where the plaintiff lent the defendant a double-barrelled gun, to try, and he overcharged and burst it, it was held that this did not amount to a conversion, the injury resulting from an accident, and that a demand of the gun "in the same good plight and condition as it was," etc., and a refusal to deliver it in such condition, was not evidence of a conversion (*Rushworth* v. *Taylor*, 3 Q. B. 699); nor does the loss of property by one to whom it was delivered for safe-keeping or carriage amount to a conversion, even though the loss resulted from his negligence (*Bowlin* v. *Nye*, 10 Cush. 416); unless his negligence is gross. *Lockwood* v. *Bull*, 1 Cow. 322.

Trover will not lie for property loaned to a person, under a contract

that he shall return the property within a certain fixed time, or pay a certain sum of money therefor, at the election of the bailee. In such a case, the bailor retaining no lien, the bailee by a refusal to return the property is treated as having elected to pay for it, and the only remedy is upon the contract (*Vincent* v. *Cornell*, 13 Pick. 294); and even where the vendor of property retains a lien upon it until paid for, if he takes a note for the amount and negotiates it, he loses all claim upon the property, as the lien passes with the debt, and he cannot maintain an action for a conversion of the property (*Esty* v. *Graham*, 46 N. H. 169); and in all cases, where a person holds the goods of another under a contract, he cannot be charged for a conversion thereof, so long as the contract remains in force, or any right to the possession, on his part, exists. *Hall* v. *Daggett*, 6 Cow. 653. As in a case where A delivered a note to B for collection, the proceeds to be applied on a note held by B against A. *Canfield* v. *Monger*, 12 Johns. 347. Before an action for a conversion can be maintained under such circumstances, the contract must be terminated. *Cushing* v. *Breck*, 10 N. H. 111; *Perley* v. *Dole*, 40 Me. 139. Where any authority is conferred upon a person by contract, to take or dispose of property, he cannot be charged with its conversion for any act done by him in reference thereto while the contract is in force, and what is done is warranted by it. Before a person under such circumstances can be charged for a conversion, his authority must be abrogated. *Clark* v. *Whitaker*, 18 Conn. 543.

Where a person expressly or impliedly assents to the retention of his property by another, such person not setting up any claim to the property inconsistent with such person's rights, he cannot maintain an action for a conversion thereof against him, until his assent to the retention of the property by him is expressly withdrawn. *Voltz* v. *Blackmar*, 64 N. Y. 646.

So, where a person takes a bond from a person, conditioned for the paying for certain property taken by another, provided it shall finally be determined that he had no right to take it, he cannot, after it has been determined that the obligor in the bond had no right to the property, maintain an action against him for its conversion, but must pursue his remedy upon the bond. *Briggs* v. *North Adams Iron Co.*, 12 Cush. 114.

Where property belonging to A is in the possession of B, who claims it as his own, and they finally agree to meet within a certain time and settle the question of title, A cannot maintain an action against B for a conversion of the property before such time has elapsed, unless he, prior to bringing the suit, makes a fresh demand for the property. Until such time has elapsed, or a new demand has been made, he, by

force of the agreement, is treated as assenting to the temporary possession of the property by B. *Finch* v. *Clarke*, Phill. (N. C.) L. 335. A person cannot be charged for a conversion of his own property, that he forcibly takes from a person who had no right thereto, although the apparent title was in him, as, for taking from him a certificate of deposit for money that was drawn upon a check in the defendant's name, by the plaintiff, who formerly had authority to draw checks in the defendant's name, but whose authority to do so had expired before the money for which the certificate of deposit was given, was drawn. Under such circumstances, although the certificate of deposit was issued to the plaintiff, it nevertheless represented money to which the defendant was entitled, and he could not be charged with a conversion of his own property, to which he had the right of immediate possession. *Voltz* v. *Blackmar*, 64 N. Y. 646.

If property is left with a person for a particular purpose and he applies it to another or different one, he is guilty of a conversion, but so long as he keeps within the line of the authority conferred upon him, he cannot be made liable for the property in trover. Thus, if a note or bill is given to A by B to get it discounted, and A gives the note to one of his creditors in payment of his own debt, or if he loans it to another, he is liable for a conversion of the note, because he was not authorized to use the note for any such purpose (*Alsager* v. *Close*, 10 M. & W. 583; *Atkins* v. *Owen*, 4 Ad. & El. 819; *Cranch* v. *White*, 1 Bing. N. C. 414), but if he procures the note to be discounted, and misapplies the money, he is not liable for a conversion of the bill or note, but must be proceeded against for a misapplication of the money. *Palmer* v. *Jarmain*, 2 M. & W. 282. "The defendant," said PARKE, B., in the case last cited, "did nothing with the bill, which he was not authorized to do, but having disposed of it and made it the property of another, which he had a right to do under the authority given him by the plaintiff to get it discounted, if he has misapplied any part of the proceeds, he must be sued for the amount as for money had and received." See, also, *Hodges* v. *Lathrop*, 1 Sandf. 46; *Goss* v. *Emerson*, 23 N. H. 38. So where property is left with a person to be sold at not less than a given price, he cannot be charged with a conversion of the property because he sells it for a less price. *Sarjeant* v. *Blunt*, 16 Johns. 74. But if he does an act not within the scope of his authority, he is chargeable in trover for the property. *Fireman's Ins. Co.* v. *Cochran*, 27 Ala. 228.

A person who purchases property that has been stolen, is liable to the owner for its conversion, but an exception is made in the case of a *bona fide* holder for value of negotiable securities that have been lost

or stolen, and the real owner cannot charge him with a conversion thereof (*Lawson* v. *Weston*, 4 Esp. 57; *Miller* v. *Race*, 1 Burr. 452; *Grant* v. *Vaughan*, 3 id. 1524; *Worcester Co. Bank* v. *Dorchester, etc., Bank*, 10 Cush. 489; *King* v. *Milsom*, 2 Camp. 5), but if he takes it with knowledge of the facts (*Bunn* v. *Morris*, 2 Cr. & M. 579), or merely to enable him to sue upon it (*Bailey* v. *Bidwell*, 13 M. & W. 73), he acquires no better title thereto than the person from whom he received it, and will be chargeable to the owner for its conversion. But the burden of impeaching his title is upon the owner (*Worcester Co. Bank* v. *Dorchester, etc., Bank*, 10 Cush. 489; *Wyer* v. *Dorchester, etc., Bank*, 11 id. 51), and the mere circumstance, that the holder was guilty of gross negligence and want of such caution as prudent business men observe, will not defeat his title and make him chargeable in trover (*Backhouse* v. *Harrison*, 5 B. & Ad. 1105; *Raphael* v. *Bank of England*, 17 C. B. 161), but such negligence may be given in evidence as tending to prove bad faith. *Arbouin* v. *Anderson*, 1 Q. B. 504; *Goodman* v. *Harvey*, 4 Ad. & El. 876; *Pease* v. *Smith*, 61 N. Y. 477. Vol. 1, p. 614.

A person who receives money which was received from the sale of property wrongfully taken, although he knows the facts, is not guilty of a conversion of the property (*Polley* v. *Lenox Iron Works*, 2 Allen, 182), neither is a person, who receives goods from a person that were wrongfully taken, liable for their conversion, because with knowledge of the facts he permits them to go back into such person's possession. *Leonard* v. *Tidd*, 3 Metc. (Mass.) 6; *Loring* v. *Mulcahy*, 3 Allen, 575. A person who receives property from one who acts as the agent of another, with apparent authority in the matter, cannot be charged by the owner with a conversion of the property if he does not depart from the terms of the bailment. Thus, where the wife of the plaintiff let his horse to the defendant during her husband's absence, it was held that the plaintiff could not maintain an action against him for a conversion of the horse (*Church* v. *Landers*, 10 Wend. 79; *contra: Green* v. *Sperry*, 16 Vt. 390); and if the person had no authority to let the horse, real or apparent, the rule is otherwise. *Garrard* v. *Pittsburgh, etc., R. R. Co.*, 29 Penn. St. 154; *Tallman* v. *Turck*, 26 Barb. 167; *Gilmore* v. *Newton*, 9 Allen, 171. A person cannot be charged with a conversion of property, because of an injury done to it, while the defendant was endeavoring to do a service to the owner, out of charity, or to prevent mischief thereto from the acts of others. Thus, where the defendant was employed with the plaintiff in an invention for making a vessel sail against the wind, and while they were working on the vessel, it took fire. The

defendant took the plaintiff's boat to endeavor to extinguish the fire, and while so engaged, it was sunk and lost, and the court held that the defendant could not be charged for a conversion of the boat. Lord ELLENBOROUGH said, "What might be a *tort* under one circumstance, might, if done under others, assume a different appearance. As, for example, if the thing for which the action was brought, and which had been lost, was taken to do a work of charity or to do a kindness to the party who owned it, *and without any intention of injury to it, or of converting it to his own use;* if, under any of these circumstances, any misfortune happened to the thing, it could not be regarded as an illegal conversion, but as it would be a justification in an action of trespass, it would be a good answer to an action of trover. *Drake* v. *Shorter*, 4 Esp. 165; *Knapp* v. *Willetts*, 1 T. & C. (N. Y. S. C.) 206. Neither can a person be charged with the conversion of property which he received from A, if he has delivered it up to the true owner, who was entitled thereto, or if he holds by the true owner's directions (*Verrall* v. *Robinson*, 2 C. M. & R. 495); or even if he has been summoned as a trustee of the person who owns the property (*Fletcher* v. *Fletcher*, 7 N. H. 452; *Leake* v. *Loveday*, 4 M. & G. 972; *Mullalieu* v. *Laugher*, 3 C. & P. 551); but a refusal to deliver the property, upon the ground that it has been demanded by another person who claims to be the owner, is evidence of a conversion. *Atkinson* v. *Marshall*, 12 L. J. (N. S.) Exch. 117.

A person cannot be charged with the conversion of property that has been annexed to the freehold. It then loses its character as personalty, and ceases to be the subject of conversion. *Jackson* v. *Walton*, 28 Vt. 43. Thus, where machinery was obtained by fraud and put into and affixed to a mill, and had become incorporated with it as a part of the realty, it was held that the use of it in that state did not constitute a conversion. *Woodruff Iron Works* v. *Adams*, 37 Conn. 233. But personal property wrongfully taken from the owner may be recovered for in trover, although the wrong-doer affixes it to the freehold. Thus, where posts, belonging to the defendant, were wrongfully taken and used in building a fence upon the defendant's premises, it was held that the defendant was liable in trover for their conversion. *St. Louis, etc., R. R. Co.* v. *Kaulbrumer*, 59 Ill. 152.

When property has been loaned to another for a specific purpose, or for a specific term, a person receiving it from the bailee cannot be charged with its conversion until the bailment has been determined, unless the bailee has forfeited his rights under the bailment, by its abuse. *Savage* v. *Smythe*, 48 Ga. 562; *Bryant* v. *Wardell*, 2 Exch. 479. Thus where the plaintiff had loaned seventeen shares of railroad stock to the defend-

ant upon which to borrow money, and transferred the title in the stock to them for that purpose, the stock to be returned upon demand, and the defendants borrowed money from certain parties, transferring the title to them, as collateral security with the plaintiff's consent, it was held that the plaintiff could not charge the defendants with a conversion of the stock, by demanding the same before the indebtedness for which it had been given had become due. But the rule is otherwise if the indebtedness is not paid at maturity. *Savage* v. *Smythe*, 48 Ga. 562.

Neither can a purchaser of goods, to which the vendor had no title, be charged for a conversion of them, if he gave his assent thereto either expressly or impliedly, as, if he stood by and saw them sold without objection or assertion of his title (*Dezell* v. *Odell*, 3 Hill, 215; *Heane* v. *Rogers*, 9 B. & C. 586; *Stephens* v. *Baird*, 9 Cow. 274); nor can the vendor be charged with the conversion of property, by selling it to the owner, who knew that it was his property that he was buying (*Downer* v. *Rowell*, 24 Vt. 343); or if he ratifies the conversion for which action is brought. *Bremer* v. *Sparrow*, 7 B. & C. 310. See *post*, p. 220, §§ 5, 6.

§ 4. **Between tenants in common.** One tenant in common, or joint tenant, can maintain trover against his co-tenant for a sale or destruction of the entire chattel by him. *Turner* v. *Waldo*, 40 Vt. 51; *Gilbert* v. *Dickerson*, 7 Wend. 449; *White* v. *Brooks*, 43 N. H. 402; *Dain* v. *Cowing*, 22 Me. 347; *Williams* v. *Chadbourne*, 6 Cal. 559; *Bell* v. *Layman*, 1 Mon. (Ky.) 39; *Arthur* v. *Gayle*, 38 Ala. 259; *Weld* v. *Oliver*, 21 Pick. 559; *Roston* v. *Morris*, 25 N. J. L. 173; *Barton* v. *Williams*, 5 B. & Ald. 395; *Perminter* v. *Kelly*, 18 Ala. 716; *Wheeler* v. *Wheeler*, 33 Me. 347; *Wilson* v. *Reed*, 3 Johns. 175; *Lowe* v. *Miller*, 3 Gratt. 205; *Dyckman* v. *Valiente*, 42 N. Y. 549; *Brightman* v. *Eddy*, 97 Mass. 478; *Mumford* v. *McKay*, 8 Wend. 442; *Herrin* v. *Eaton*, 13 Me. 195; *contra*, see *Oviatt* v. *Sage*, 7 Conn. 95; *Pitt* v. *Petway*, 12 Ired. 69; *Burton* v. *Burton*, 27 Vt. 93; *Hall* v. *Page*, 4 Ga. 428. But it will not lie for a mere attempted sale that was not consummated (*Estey* v. *Boardman*, 61 Me. 595); nor for a sale that, by contract or otherwise, he was authorized to make (*Hewlett* v. *Owens*, 51 Cal. 570); nor for a sale of his interest only (*Bell* v. *Layman*, 1 T. B. Monr. 39; *Estey* v. *Boardman*, 61 Me. 595; but see *Weld* v. *Oliver*, 21 Pick. 559); nor unless he has so disposed of it as to render it impossible that his co-tenant should ever enjoy its use. *Fennings* v. *Grenville*, 1 Taunt. 241. The action also lies where one co-tenant applies the property exclusively to his own use to the total exclusion of his co-tenant, and refuses to sever, where a severance is possible (*Fiquet* v. *Allison*, 12 Mich. 328; *Lobdell* v. *Stowell*, 51 N. Y. [6 Sick.]

70; *Benedict* v. *Howard*, 31 Barb. 571; *Agnew* v. *Johnson*, 17 Penn. St. 377; *Strickland* v. *Parker*, 54 Me. 263); or if he changes the quality, character or form of the property by manufacturing it, as by manufacturing wool into cloth, or lumber into wagons, etc., without the consent of his co-tenant express or implied (*Redington* v. *Chase*, 44 N. H. 36; *Yamhill Bridge Co.* v. *Newby*, 1 Oregon, 174; *Allen* v. *Harper*, 26 Ala. 686; *Kilgore* v. *Wood*, 56 Me. 154; *Fennings* v. *Grenville*, 1 Taunt. 246); but the mere change of the form or characters of the common property will not amount to a conversion, as, by using it for manufacturing purposes for which it was intended, *if its manufacture was necessary to preserve the property itself*. *Kilgore* v. *Wood*, 56 Me. 154; *Fennings* v. *Grenville*, 1 Taunt. 246. But, for a mere withholding of the property from his co-tenant, he cannot be charged as for a conversion, for the rights of the parties are equal (*Wilson* v. *Reed*, 3 Johns. 175); and one has no more right to the possession of the property than the other. "It is very clear," says the court in *Wild* v. *Oliver*, 21 Pick. 559, "that one tenant in common cannot maintain an action of trover against his co-tenant for the mere act of withholding from him the use of the chattel, the rights of both being such that he who has possession cannot be guilty of a conversion by retaining it. Such a right results from the nature of the relation between the parties; and to this inconvenience each must be subject, the mere change of possession under such circumstances being no conversion." *Post*, p. 218.

For the conversion of the property, by a stranger, as where an officer levies upon and sells the entire property, upon an execution against one, the other tenant may maintain trover against the officer for his moiety of the property. *White* v. *Morton*, 22 Vt. 15; *Waddell* v. *Cook*, 2 Hill, 47, *n*.

Where the mortgagee of the interest of one tenant in common of a chattel causes the whole chattel to be sold at a public sale, by virtue of his mortgage, one who purchases and takes possession of the chattel at such sale, with notice of the rights of the other tenant in common thereof, is liable to the latter in an action by him for the conversion of his interest therein. *Van Doren* v. *Balty*, 11 Hun (N. Y.), 239.

§ 5. **Between buyer and seller.** The purchaser of goods cannot maintain trover for them against the seller, in whose possession they are left, until he has paid or tendered their price, for, although he acquires the right of property by his purchase, he does not acquire the right of possession until he has paid the price agreed upon, or tendered it to the seller. *Bloxam* v. *Sanders*, 4 B. & C. 941. And this has been held to be the case, even where the goods were sold upon credit

*Bloxam* v. *Morley*, 4 B. & C. 951. The ground upon which the first case proceeds, and which seems to be tenable, is, that by the purchase, the vendee only acquires a right of property, by the purchase, which does not ripen into a property in him, until he has paid the price, or the property has been delivered to him in pursuance of the sale. *Mucklow* v. *Mangles*, 1 Taunt. 318; *S. P. Woods* v. *Russell*, 5 B. & Ald. 942. But, where the sale is complete, and the articles are *in esse*, and specifically designated, and a credit is agreed upon, unless the vendee has been guilty of fraud in the purchase or procurement of credit, it is believed that he may maintain trover against the vendor for a refusal to deliver the goods. *Evans* v. *Nicholl*, 3 M. & G. 614. But if any thing remains to be done, or if the property is not set apart from other property of the same kind, or if the contract is within the statute of frauds, or if the article is to be made, trover will not lie. *Austen* v. *Craven*, 4 Taunt. 644; *White* v. *Wilks*, 5 id. 156; *Mucklow* v. *Mangles*, 1 id. 318. And, where the property has not been set apart from other property of the same kind, or where it is to be manufactured, it is held that trover will not lie for the property, because the plaintiff's title applies to no specific property, even though the price has been paid. *Mucklow* v. *Mangles*, 1 Taunt. 318 Where the property is specifically designated, but something remains to be done to it, the question whether the title passes before the article is ready for delivery, and consequently whether trover could be maintained by the buyer therefor or not, depends on the *intention* of the parties. *Young* v. *Matthew*, L. R., 2 C. P. 127. In *Mucklow* v. *Mangles*, 1 Taunt. 318, it was held that the buyer of a chattel ordered to be made for him acquires no property in the chattel until it is finished and delivered to him; and, therefore, before then, cannot maintain trover for it, though he has paid the price beforehand, and there can be no question but this doctrine is predicated upon principles that cannot be impugned. But, if property has been delivered to the vendee, actually or constructively, trover lies in his favor against the vendor, as, if the property has been delivered to a carrier and transported to the port of delivery, and there is no valid ground for stopping the goods *in transitu*. Thus A, by direction of B, purchased coffee for B which was to be delivered at Leghorn to B's order. The coffee was sent to Leghorn and was sold by A's agents and by his directions. It was held that B could maintain trover against A for the coffee, even though the price had not been tendered. *Payne* v. *Brander*, 2 Stark. 568. The ground upon which this case proceeded was, that, as the property had been consigned to any person to be appointed by the plaintiff and marked with the letter P. and insured in his name, the property had vested in him. "If,"

said ABBOTT, Ld. Ch. J., "the coffee had been lost in the course of the voyage, he (the plaintiff) must have borne the loss," and in all such cases, the question is, whether the parties have so conducted in reference to the property, that the title has vested in the purchaser. *Woodley* v. *Brown*, 1 C. & P. 593; *Rall* v. *Black*, Dudley (Ga.), 18. Where property has been sold upon credit, to be paid for within a certain time, if the vendor sells it before the term expires, the vendee, by tendering the price within the time, can maintain trover for the property. *Ferguson* v. *Carrington*, 3 C. & P. 457. And it is held that if the price is tendered *after* the time had expired, but *before* its re-sale by the vendor, the vendee may maintain trover therefor (*Martindale* v. *Smith*, 1 Q. B. 389); but not if the price is not tendered until after he has re-sold the property. *Milgate* v. *Kebble*, 3 M. & G. 100. Thus, in *Bloxam* v. *Sanders*, 4 B. & C. 941, A, a hop merchant, on several days in August, sold to B by contract various parcels of hops; part of them were weighed, and an account of the weights, together with samples, delivered to the vendee. The usual time of payment in the trade was the second Saturday subsequent to the purchase. B did not pay for the hops within the usual time, whereupon A gave him notice that if they were not paid for by a given day they would be re-sold. The hops were not paid for, and A re-sold a part of them with the assent of B, who afterward became bankrupt, and then A sold the balance of the hops without B's consent. Account sales of the hops were delivered to B in which he was charged warehouse rent from the 30th of August. The assignees of B demanded the hops of A and tendered the warehouse rent, charges, etc., and A having refused to deliver them, brought trover therefor. The jury found that A had not rescinded the contract, but the court held that the assignees could not maintain the action because they had neither paid nor tendered the price.

Where a vendee obtains goods upon credit by fraud, and they are delivered to him, the title does not pass, if the vendor elects to treat the sale as void, and trover lies against him for the goods. *Stephenson* v. *Hart*, 4 Bing. 476; *Noble* v. *Adams*, 7 Taunt. 59; *Ayres* v. *French*, 41 Conn. 153; *Ferguson* v. *Carrington*, 9 B. & C. 59; *Bristol* v. *Wilsmore*, 1 id. 574; *Hall* v. *Naylor*, 18 N. Y. 588; *Dow* v. *Sanborn*, 3 Allen, 181; *Kilby* v. *Wilson*, Ry. & Moo. 178; *Read* v. *Hutchinson*, 3 Camp. 352; *Williamson* v. *Russell*, 39 Conn. 406; *Gage* v. *Epperson*, 2 Head (Tenn.), 669.

Where property sold upon credit has been delivered, and the vendor, without authority, retakes and sells the property, he is liable to the vendee for its conversion. *Huelet* v. *Reyns*, 1 Abb. Pr. (N. S.) 27. A purchase of property from one who has no title or authority to

sell it is no defense to an action for its conversion by the real owner (*Cooper* v. *Newman*, 45 N. H. 339; *Gilmore* v. *Newton*, 9 Allen, 171), and the person so taking and retaining the possession of it is guilty of a conversion, without any demand made upon him therefor. Id.

§ 6. **Between landlord and tenant.** When a tenant makes erections of a permanent character upon leased premises without the assent of the landlord, express or implied, they become fixtures, and if he removes them without authority, he is liable therefor in trover. *Washburn* v. *Sproat*, 16 Mass. 449; *Reid* v. *Kirk*, 12 Rich. (S. C.) 54. But when the building is erected, or the annexation is made under authority, express or implied, the rule is otherwise, and authority may be implied when the erection is necessary to the enjoyment of the premises for the purposes for which they were let, and under such circumstances, if the landlord prevents the tenant from removing these erections or annexations, he is liable therefor in trover (*Dame* v. *Dame*, 38 N. H. 429; *Pullen* v. *Bell*, 40 Me. 314; *Parker* v. *Godard*, 39 id. 144; *Hinckley* v. *Baxter*, 13 Allen, 139; *Davis* v. *Taylor*, 41 Ill. 405; *Adams* v. *Godard*, 48 Me. 212; *Overton* v. *Williston*, 31 Penn. St. 155; *Crippen* v. *Morrison*, 13 Mich. 23; *Smith* v. *Benson*, 1 Hill, 176; *Osgood* v. *Howard*, 6 Me. 452), as, if he sells the land before the right to remove has expired without reserving the buildings. *Bircher* v. *Parker*, 43 Mo. 443. But the mere conveyance of premises occupied by a tenant, the tenant continuing in the peaceable and quiet possession thereof, cannot be regarded as a conversion of fixtures that the tenant has a right to remove. *Davis* v. *Buffum*, 51 Me. 160. In a Missouri case, *Bircher* v. *Parker*, 43 Mo. 443, a lessee under a decree of court had liberty to remove erections made by him, within a reasonable time after an injunction procured by the landlord to prevent him from removing, had been dissolved, although the lease had expired when the dissolution was effected. Pending the injunction, the landlord conveyed the premises to a *bona fide* purchaser without notice of the tenant's claim. The court held that by such conveyance the landlord became liable to the tenant in trover for the conversion of the buildings.

Where property is leased for a term, the landlord cannot maintain trover against a stranger who wrongfully takes it from the tenant's possession during the time (*Gordon* v. *Harper*, 7 T. R. 9), for while the property is in him, the right of possession is in the tenant, and for this reason the tenant alone can sue. Ib. But he can maintain the action against an outgoing tenant for crops harvested *after* the expiration of his term, although they were sown before, under an idea that he was entitled to an away-going crop (*Davies* v. *Connop*, 1 Price, 53); so where a farm is carried on upon shares, the landlord may maintain

trover against the tenant, if he sells the entire crop (*Turner* v. *Waldo*, 40 Vt. 51; *Delaney* v. *Root*, 99 Mass. 546); and the same rule prevails if he unreasonably refuses to divide the crops, although he has neither consumed or sold them. The rule, as existing in New York, is that, where parties own property in common that is susceptible of ready severance, as grain, so that the share of each can be readily ascertained with exactness, by measure or weight, each owner has a right to sever and take his share (*Tripp* v. *Riley*, 15 Barb. 333; *Fobes* v. *Shattuck*, 22 id. 568); and where the property is in the exclusive possession of one, a refusal by him to permit another owner to sever and take his share is equivalent to a conversion for which trover will lie. *Channon* v. *Lusk*, 2 Lans. (N. Y.) 211; *Lobdell* v. *Stowell*, 37 How. 88, 96; 51 N. Y. (6 Sick.) 70. In the case of a vessel owned in common by several persons in an equal proportion, a court of equity has power to decree a partition of it. *Andrews* v. *Betts*, 8 Hun, 322.

Trover lies in favor of a tenant against the landlord for a wrongful (*Shipwick* v. *Blanchard*, 6 T. R. 298) or excessive distress. *Fisher* v. *Algar*, 2 C. & P. 274. Where the landlord takes forcible possession of the demised premises and removes the tenant's goods and refuses to let him take them away, he is liable to the tenant in trover for their conversion. *Hipple* v. *DePuie*, 51 Ill. 528.

§ 7. **Between husband and wife.** When the husband appropriates and converts the separate property of the wife, without her consent, he is liable therefor in trover. Especially is this so in those States where the wife, by statute, is vested with the exclusive title to her separate property and authorized to sue or be sued in reference thereto. And such is also the rule where the husband has made an ante-nuptial agreement with his wife surrendering his marital rights to her property. *Albee* v. *Cole*, 39 Vt. 319. But, where neither by statute or by an ante-nuptial agreement the wife is vested with the absolute title to her separate estate, the husband is entitled to her property and cannot be made chargeable with its conversion. Where property is converted by the wife, both she and her husband may be joined as defendants, unless a contrary provision is made by statute (*Keyworth* v. *Hill*, 3 B. & Ald. 685; *Catterall* v. *Kenyon*, 3 Q. B. 310), and in any event, it lies against both for a joint conversion. *Davis* v. *Taylor*, 41 Ill. 405; *Ring* v. *Billings*, 51 id. 475.

§ 8. **Between bailor and bailee.** The bailee of goods for a term, or for a specific purpose, acquires the right to the possession during such term, or until such specific purpose is consummated, and can maintain trover against any person who interferes with his right of possession, and the owner cannot sue a wrong-doer for converting the property, so

long as the bailment continues (*Bradley* v. *Copley*, 1 C. B. 698; *Gordon* v. *Harper*, 7 T. R. 913; *Billings* v. *Tucker*, 6 Gray, 308; *Harvey* v. *Epes*, 12 Gratt. 153; *Sutton* v. *Buck*, 2 Taunt. 307; *Burton* v. *Hughes*, 2 Bing. 173; 9 Moore, 334); and he may maintain trover even against the bailor, if he takes the property out of his possession without right, before the bailment expires. *Hickok* v. *Buck*, 22 Vt. 149; *Roberts* v. *Wyatt*, 2 Taunt. 268. Where a bailee of property for a special purpose applies it to another or a different one, the bailment is thereby terminated, and he may be sued in trover by the bailor for the conversion of the chattel. As where property is delivered to A, to be delivered to B, and he applies it to his own use, or delivers it to another person; or, where money is delivered to a person to pay a specific debt, or to be applied to a particular purpose, and it is applied upon another debt, or for a different purpose. *Norton* v. *Kidder*, 54 Me. 189; *Farrand* v. *Hurlburt*, 7 Minn. 477. So, where property is deposited with a person as collateral security for a particular debt, if he refuses to deliver it up when that debt is paid, he is liable in trover for its conversion, although he has another debt against the bailor, and holds the property as security for the payment of that (*Latimer* v. *Wheeler*, 30 Barb. 485; *Robbins* v. *Packard*, 31 Vt. 570); and generally, it may be said that a bailee of property for one purpose, is guilty of a conversion thereof if he applies it to another, or inconsistent use. The reason is, that a bailment arises only from a contract, express or implied, and the bailee has a right to the custody or use of the property only so long as he abides by the terms of the contract. *Crocker* v. *Gullifer*, 44 Me. 491; *Graves* v. *Smith*, 14 Wis. 5; *Richardson* v. *Dingle*, 11 Rich. (S. C.) 415; *Fish* v. *Ferris*, 5 Duer (N. Y.), 49; *Harvey* v. *Epes*, 12 Gratt. 153; *Lucas* v. *Trumbull*, 15 Gray, 306; *Moseley* v. *Wilkinson*, 24 Ala. 411. This is well illustrated by LITTLETON, Co. Litt. 57 a. "If," says he, "I lend to one my sheep to lathe his land, or my oxen to plough the land, and he killeth the cattle, I may well have an action against him, notwithstanding the lending," and COKE adds, "and the reason is, that when the bailee having but a bare use of them, taketh upon him, as owner, to kill them, he loseth the benefit of the use of them." Where a bailee, whether for a specific term, or for a specific purpose, *sells* the property (*Lovejoy* v. *Jones*, 30 N. H. 164; *Porter* v. *Foster*, 20 Me. 391); or misuses it, he thereby terminates the bailment, and is at once liable to the bailor for its conversion (*Ripley* v. *Dolbier*, 18 Me. 382); and the same is true if he alters or changes the nature of the property, or does any thing to destroy its identity. *Fenn* v. *Bittlestone*, 7 Exch. 159; *Bryant* v. *Wardell*, 2 id. 482; *Farrant* v. *Thompson*, 5 B. & Ald. 828. In *Bryant* v.

*Wardell*, 2 Exch. 479, the plaintiff let to the defendants certain theatrical property for the term of twelve months, to be used in exhibiting what was designated as the "Original John Bull." A portion of the property was applied to a different purpose, and was taken to pieces and reconstructed in a different form. The court held that trover would lie for the property, POLLOCK, C. B., saying: "The rule is, that where there has been a misuser of the thing lent, as by its destruction or otherwise, there is an end of the bailment, and the action of trover is maintainable for the conversion." *Cooper* v. *Willomatt*, 1 C. B. 672; *Beach* v. *Raritan, etc., R. R. Co.*, 37 N. Y. 457; *Sanborn* v. *Coleman*, 6 N. H. 14; *contra*, see *Lewis* v. *Mobley*, 4 Dev. & Bat. 323; *Lyons* v. *Rogers*, 1 Brev. 5.

Where goods were received by two persons to be re-delivered on demand, and one of them, without the knowledge of the other, delivered them to a person who claimed them adversely to the bailor, it was held that the one delivering them to such person was guilty of a conversion, but that both could not be charged therewith (*Lockwood* v. *Bull*, 1 Cow. 322; *Mitchell* v. *Williams*, 4 Hill, 13); neither does a demand upon, and a refusal to deliver by one of two bailees, of itself establish a joint conversion, unless the bailees are partners. Id. But if the bailees are partners, a demand upon, and refusal by one, is evidence of a joint conversion (*Holbrook* v. *Wight*, 24 Wend. 169); but the person making the demand, if made by another than the bailee, must establish his right to do so, or the refusal to deliver will not amount to a conversion. *Beckly* v. *Howard*, 2 Brev. (S. C.) 94. If, however, a bailee agrees to deliver the property to a vendee of the bailor, but afterward refuses to do so, and delivers them to the bailor, he will be guilty of a conversion in an action by such vendee. *Smith* v. *Bell*, 9 Mo. 873. A person cannot be made a bailee against his will; consequently if a person leaves goods in another's building without his assent, express or implied, he is not charged with their custody, or liable for their conversion, if they are taken away by a stranger (*Lethbridge* v. *Phillips*, 2 Stark. 544); nor is he liable to the owner for their conversion, simply because he refuses to deliver them up on demand, without proof of the owner's right thereto (*Green* v. *Dunn*, 3 Camp. 216, *n.*); and the same rule prevails where the goods were delivered to the bailee and he agreed to keep them for the bailor, and the bailor sells them to a third person, and he refuses to deliver them to such vendee until he has had time to ascertain whether he is entitled to have the goods (*Lee* v. *Bayes*, 18 C. B. 607; *Sheridan* v. *New Quay Co.*, 4 C. B. [N. S.] 618; *Solomons* v. *Dawes*, 1 Esp. 82); and if he has a *bona fide* doubt he is entitled to a reasonable time to resolve it. *Pillot* v. *Wilkinson*, 3 H. & C. 345.

But if his servant, with whom the property is temporarily intrusted, refuses to deliver it up to the owner, the bailor is liable for its conversion. *Buxton* v. *Baughan*, 6 C. & P. 674. A demand of goods bailed is not always necessary, as preliminary to an action of trover, and this is especially the case where the property has been actually converted, or there has been such an abuse of the property, or of the rights of the bailor, as to terminate the bailment. *Alden* v. *Pearson*, 3 Gray, 342; *Cothran* v. *Moore*, 1 Ala. 423; *Spencer* v. *Morgan*, 5 Ind. 146; *Warner* v. *Dunnavan*, 23 Ill. 380.

§ 9. **Between pledgor and pledgee.** A pledgee may sell the property pledged, without judicial proceedings, after the debt becomes due, but, unless notice of sale is expressly waived in the contract, he must first give notice to the pledgor of the time and place of sale (*Mowry* v. *Wood*, 12 Wis. 413; *Parker* v. *Brancker*, 22 Pick. 40; *Genet* v. *Howland*, 45 Barb. 560; *Washburn* v. *Pond*, 2 Allen, 474; *Stevens* v. *Hurlburt*, 31 Conn. 146; *Diller* v. *Brubaker*, 52 Penn. St. 468; *Wheeler* v. *Newbould*, 16 N. Y. 392; Vol. 5, pp. 173, 176); and if he sells without giving such notice he is liable for its conversion to the pledgor even without a tender of any part of the debt for which it was pledged. The pledgee having voluntarily put it out of his power to return the property, a tender would be fruitless (*Lewis* v. *Graham*, 4 Abb. Pr. [N. Y.] 106; *Cortelyou* v. *Lansing*, 2 Cai. Cas. 200; *Fisher* v. *Brown*, 104 Mass. 259; *Wilson* v. *Little*, 2 N. Y. 443; *Strong* v. *National Banking Ass'n*, 45 id. 718); and he must sell at public sale unless otherwise agreed, and if he sells at private sale he will be liable for the conversion of the property (*Baltimore, etc., Ins. Co.* v. *Dalrymple*, 25 Md. 269); and the same is true where the pledgee refuses to deliver up the property on payment of the principal debt (*Luckey* v. *Gannon*, 37 How. Pr. 134; 6 Abb. [N. S.] 209; *Hardy* v. *Jaudon*, 1 Robt. [N. Y.] 161); and a sale without authority, or for non-compliance with a demand which he has no right to make, is a conversion. *Hope* v. *Lawrence*, 1 Hun, 317; *Boughton* v. *United States*, 12 Ct. of Claims, 331. During the time for which the property was pledged, it may, with the assent of the pledgor, be used by the pledgee in any way consistent with the ownership and the ultimate rights of the pledgor. *Lawrence* v. *Maxwell*, 53 N. Y. (8 Sick.) 19. Where the pledgee sells the property to a *bona fide* purchaser without knowledge or notice of any claim of the pledgor thereon, the latter cannot maintain trover against such purchaser, without first tendering him the amount due on the pledge. *Talty* v. *Freedman's Savings Bank*, 93 U. S. (3 Otto) 321.

Where the pledgee still retains the property, the pledgor may redeem

it even though the time for payment has expired and the property has been advertised for sale. *White Mountain Railroad* v. *Bay State Iron Co.*, 50 N. H. 57. If a person having no title to the property pledges it to secure a loan, the real owner may maintain trover against such pawnee and he is not bound to pay or tender to him any part of the debt for which it was pledged. *Gallaher* v. *Cohên*, 1 Browne (Pa.), 43; *Thrall* v. *Lathrop*, 30 Vt. 307.

§ 10. **Conversion by warehousemen.** If a warehouseman, with whom property has been deposited, sells it without authority from the bailor, he is liable for its conversion, and without any demand first being made (*Hagood* v. *Elson*, 21 Tex. 506); and this is so, even though he sold the property to preserve it from loss, and, as he honestly believed, for the interests of the bailor. *Jordain* v. *Shirman*, 28 Ind. 136. So, too, he is liable for goods lost by reason of his neglect to follow the instructions of the bailor. Thus, where the plaintiffs deposited a quantity of flour with a warehouseman and afterward notified him that they had made arrangements with a railroad to transport it, and had given them an order for it, and afterward, he shipped it by a propeller and it was lost, it was held that his disobedience of the instructions to ship the flour by rail, and its loss as a consequence, was a conversion of the flour that made him liable in an action of trover. *Graves* v. *Smith*, 14 Wis. 5; *Martin* v. *Cuthbertson*, 64 N. C. 328. But if he obeys instructions, he cannot be made responsible for the loss of the property; though if he delivers the property to the wrong party, whether by negligence or accident, he is liable for its conversion. *Coyckendall* v. *Eaton*, 55 Barb. 188. He is not, in the absence of an actual conversion, responsible for property until it is demanded of him, but if he fails to deliver it up on demand and payment of his charges, he is liable for its conversion. *Vaughan* v. *Webster*, 5 Harr. (Del.) 256. But he is not liable for a refusal to deliver, when the demand is made by a person other than the storer, unless he produces evidence of his right to the property (*Patten* v. *Baggs*, 43 Ga. 167); because he is responsible to the owner in trover for any mistake in this respect, and therefore has a right to protect himself in any reasonable way. *Jeffersonville R. R. Co.* v. *White*, 6 Bush (Ky.), 251.

§ 11. **Between principal and agent.** While an agent acts within the scope of the authority conferred upon him, he is not liable to the principal in trover for any misuse or disposition of property made by him (*McMorris* v. *Simpson*, 21 Wend. 610), but when he wholly departs therefrom, he is treated as acting for himself. Thus where an agent is intrusted with property to *sell*, if he exchanges it for other

property he is guilty of a conversion, and is liable in trover for the property. *Ainsworth* v. *Partillo*, 13 Ala. 460; *Syeds* v. *Hay*, 4 T. R. 260; *Youl* v. *Harbottle*, Peake, 49. But where he is authorized to sell, the fact that he sells for a less price than he was instructed to sell for does not amount to a conversion of the property. *Dufresne* v. *Hutchinson*, 3 Taunt. 117; *Moore* v. *McKibbin*, 33 Barb. 246.

If he converts the property of his principal to his own use, or if he sells it in payment of his own debts or with a preconceived intent to defraud him, he is liable therefor in trover, and the person purchasing, if aware of the agent's fraud at the time of purchase, is equally liable with him. *White* v. *Wall*, 40 Me. 574; *Columbus Co.* v. *Hurford*, 1 Neb. 146. So if an agent is intrusted with money to be loaned in the name of his principal, and he loans it in his own name his act is a conversion of the money, and trover will lie therefor. *Farrand* v. *Hurlburt*, 7 Minn. 477. But, if no instructions in that respect are given, the mere fact that he takes a note for a debt due to the principal, in his own name, does not necessarily establish a conversion. *Kidd* v. *King*, 5 Ala. 84; *Walter* v. *Bennett*, 16 N. Y. 250; *Floyd* v. *Day*, 3 Mass. 403. *Contra*, see *City Council* v. *Duncan*, Treadw. (S. C.) 436. An unauthorized sale of property by an agent is a wrongful conversion that dispenses with a demand, and destroys any lien he may have had upon the goods. *Etter* v. *Bailey*, 8 Penn. St. 442. So where an agent claims to have purchased the goods from his principal and refuses to account, he thereby becomes guilty of, and liable for a conversion of them. *Soloman* v. *Waas*, 2 Hilt. (N. Y.) 179.

§ 12. **Between mortgagor and mortgagee.** If a mortgagor of chattels that are left in his possession, sells them, or any portion of them, pending the mortgage, he is guilty of a conversion and liable to the mortgagee for their value. Thus, after a mortgage of goods had been put on record and all the necessary steps taken to perfect the mortgagee's right under the mortgage, and the mortgagor who remained in possession assigned the goods and aided the assignee, in clandestinely removing them out of the State, it was held that, whether the assignees were liable in trover to the mortgagee or not, the mortgagee was (*Strickland* v. *Barrett*, 20 Pick. 415; *Ashmead* v. *Kellogg*, 23 Conn. 70; *White* v. *Phelps*, 12 N. H. 382); and if a mortgagee who has the goods in his possession, sells them otherwise than as provided by the mortgage, or until he has complied with all legal requirements, the mortgagor may sue him in trover for the goods (*Simpson* v. *Carlton*, 1 Allen, 109); and in the case of real estate, if the mortgagee sells timber cut upon the premises, after the mortgage is

paid, he is guilty of a conversion, for which trover lies by the mortgagor. *Hutchins* v. *King*, 1 Wall. 53.

A person, who, at the request of the mortgagor in possession, merely removes certain mortgaged chattels from one place to another, against the orders of the mortgagee, is not guilty of a conversion, although the mortgage provided that the chattels should not be removed without the consent of the mortgagee, and such consent was not given. *Metcalf* v. *McLaughlin*, 122 Mass. 84.

§ 13. **Conversion by a carrier.** A carrier, like any other individual, is liable for goods converted by him or his servants (*Young* v. *Mason*, 8 Pick. 551; *Dench* v. *Walker*, 14 Mass. 500), as if he or his servants adulterates liquors being transported by him (id.); or if he pledges goods (*Kitchell* v. *Vanadar*, 1 Blackf. 356); or misdelivers them through mistake (*Devereaux* v. *Barclay*, 2 B. & Ald. 702; *Youl* v. *Harbottle*, Peake, 49; *Bullard* v. *Young*, 3 Stew. 46; *Stephenson* v. *Hart*, 4 Bing. 476); or sells them (*Lecky* v. *McDermott*, 8 S. & R. 500; *Bailey* v. *Shaw*, 24 N. H. 297); or where he delivers them to a wharfinger contrary to the instructions of the consignor, under an impression, mistaken however, that the wharfinger had a lien thereon. Thus, where the owner of good son board a vessel, directed the captain not to land them on the wharf against which the vessel was moored, which he promised not to do, but afterward delivered them to the wharfinger for the owner's use, under the idea that the wharfinger had a lien upon the goods for the wharfage fees, because the vessel was unloaded against his wharf, the court held that upon demand made by the consignee for the goods, under these facts, the carrier was liable for a conversion of the goods, unless he could maintain the right of the wharfinger to have the goods delivered to him by reason of a lien thereon. "It is clear," said Lord Kenyon, "that the plaintiff is entitled to recover either against the defendant or the wharfinger, and if no wharfage be due, I think that this action may be maintained against the defendant."

Mere delay in the delivery of goods, unless there has been a demand, does not amount to a conversion (*Briggs* v. *New York, etc., R. R. Co.*, 28 Barb. 515; *Robinson* v. *Austin*, 2 Gray, 564); nor does the loss of goods by his mere negligence. *Bowlin* v. *Nye*, 10 Cush. 416; *Rose* v. *Johnson*, 5 Burr. 2825. But it will not be profitable to pursue this matter further, since an action for a conversion of goods is rarely brought against a carrier, the better remedy being an action upon the case setting forth the contract liability, or an action upon the contract itself. Vol 2, pp. 55, 56, 58.

§ 14. **Conversion by the hirer of a chattel.** There is an implied

obligation upon the part of the hirer of a chattel not to employ it for any other purpose, or use or detain beyond the time for which it was hired (*Mayor of Columbus* v. *Howard*, 6 Ga. 213); and if the property is used in a different manner, or for a different purpose than was agreed by the parties, the bailment is at once determined, and the hirer is liable in trover as for its conversion. *Wheelock* v. *Wheelwright*, 5 Mass. 104; *Homer* v. *Thwing*, 3 Pick. 492; *Rotch* v. *Hawes*, 12 id. 136; *Disbrow* v. *Ten Broeck*, 4 E. D. Smith (N. Y.), 397; *Lucas* v. *Trumbull*, 15 Gray, 306; *Fisher* v. *Kyle*, 27 Mich. 454; *Spencer* v. *Pilcher*, 8 Leigh (Va.), 565; *Crocker* v. *Gullifer*, 44 Me. 491; *Horsely* v. *Branch*, 1 Humph. 199. As where a horse is lent to go to one place, and is driven to another (*Crocker* v. *Gulliper*, 44 Me. 491; *Isaack* v. *Clark*, 2 Bulstr. 306; *Fisher* v. *Kyle*, 27 Mich. 454); or a wagon is lent for one purpose and is used for another. Thus, where the defendant borrowed a carriage to use in a particular place, and instead of using it there, sent it heavily loaded to another place, whereby the carriage was damaged, it was held that the defendant was guilty of a conversion. *Hart* v. *Skinner*, 16 Vt. 138. So, where a slave was let to the defendant to work upon a farm, and he was put at work upon a steamboat and drowned, the defendant was held chargeable in trover for the value of the slave (*Richardson* v. *Dingle*, 11 Rich. [S. C.] 405); and the same rule applies to any species of property. *Fail* v. *McArthur*, 31 Ala. 26; *Moseley* v. *Wilkinson*, 24 id. 411; *Spencer* v. *Pilcher*, 8 Leigh, 565; *Perham* v. *Coney*, 117 Mass. 102. It is of no importance whether the article was injured by such unlawful use or not, except as affecting the question of damages, when the property has been returned. In any event the plaintiff would be entitled to recover nominal damages. *Delano* v. *Curtis*, 7 Allen, 476. The right of action in such cases does not grow out of the contract, and the wrong complained of is for an invasion of the plaintiff's rights, and not for a breach of the contract. "The distinction," said Gray, J., in *Hall* v. *Corcoran*, 107 Mass. 251; 9 Am. Rep. 30, "between an action for misusing a horse in violation of the contract of letting, and an action for a conversion of the horse for driving it to a place without the contract, is clearly marked in the early cases in this court, in which, while the old rules of pleading prevailed, it was decided that an action for driving a horse beyond the distance agreed might be in trover, without regard to the question whether the property had been misused; and that an action for immoderately driving a horse upon a journey authorized or assented to by the owner, must be in case for a misfeasance, and not in trover for a conversion." *Wheelock* v. *Wheelwright*, 5 Mass. 104; *Homer* v. *Thwing*, 3 Pick. 492; *Rotch* v. *Hawes*, 12 id. 136; *Lucas* v. *Trum-*

*bull*, 15 Gray, 306. Therefore the right of action in the case of a conversion for exceeding the scope of the bailment is not affected by the invalidity of the contract under which the bailment arose, and even in those States where, by statute, contracts made upon the Sabbath are made invalid, or traveling upon the Sabbath is prohibited, a recovery may be had, if the bailment is exceeded. *Morton* v. *Gloster*, 46 Me. 520; *Woodman* v. *Hubbard*, 25 N. H. 67; *Hall* v. *Corcoran*, 107 Mass. 251. In the latter case, a horse was let upon Sunday to be driven to one place, and it was driven considerably beyond, and in returning to the place to which it was hired to go, the horse was considerably injured. In an action of trover therefor, it was objected to a recovery, that the letting having been made upon and for use upon Sunday, no recovery could be had. The court held otherwise, GRAY, J., saying: "The fact that the owner of property has acted, or is acting unlawfully in regard to it, is no bar to a suit by him against a wrongdoer, to whose wrongful act the plaintiff's own illegal conduct has not contributed." The fact that the plaintiff has taken pay for the use of the property, according to the provisions of the contract, in ignorance of the conversion, will not bar the action, but if, with knowledge of the conversion, before the bailment is ended, he does so, the weight of authority seems to be, that it is a waiver of the conversion, and a bar to an action therefor. Thus, in *Moseley* v. *Wilkinson*, 24 Ala. 411, it was held that, if a slave is let for a particular purpose, and is used for another, that the hirer is guilty of a conversion, and liable for the value of the slave; but that if, with full knowledge of the conversion before the expiration of the term, he receives the stipulated hire for the entire term, he is estopped from bringing trover. *Fail* v. *McArthur*, 31 Ala. 26; *Spencer* v. *Pilcher*, 8 Leigh, 565. But if he is not aware of the conversion until the bailment is ended, he cannot be estopped from a recovery because he receives the contract price. *Disbrow* v. *Ten Broeck*, 4 E. D. Smith (N. Y.), 397. But if he receives compensation for the unlawful, as well as the lawful use, he is estopped from bringing trover therefor. *Rotch* v. *Hawes*, 12 Pick. 136. When the owner has parted with his possession of goods by contract, for a certain time or purpose, he cannot maintain trover against a stranger for wrongfully taking them out of the hirer's possession, but the action should be brought by the hirer, unless the hirer by some wrongful act has forfeited his right to the possession of the property. *Gordon* v. *Harper*, 7 T. R. 9, 13; *Scott* v. *Newington*, 1 M. & R. 252. The owner's remedy in such cases is by an action on the case for an injury to his reversionary interest in the property. *Tancred* v. *Allgood*, 4 H. & N. 438; *Hall* v. *Pickard*, 3 Camp. 186. The hirer of a chattel acquires only the right to use,

obligation upon the part of the hirer of a chattel not to employ it for any other purpose, or use or detain beyond the time for which it was hired (*Mayor of Columbus* v. *Howard*, 6 Ga. 213); and if the property is used in a different manner, or for a different purpose than was agreed by the parties, the bailment is at once determined, and the hirer is liable in trover as for its conversion. *Wheelock* v. *Wheelwright*, 5 Mass. 104; *Homer* v. *Thwing*, 3 Pick. 492; *Rotch* v. *Hawes*, 12 id. 136; *Disbrow* v. *Ten Broeck*, 4 E. D. Smith (N. Y.), 397; *Lucas* v. *Trumbull*, 15 Gray, 306; *Fisher* v. *Kyle*, 27 Mich. 454; *Spencer* v. *Pilcher*, 8 Leigh (Va.), 565; *Crocker* v. *Gullifer*, 44 Me. 491; *Horsely* v. *Branch*, 1 Humph. 199. As where a horse is lent to go to one place, and is driven to another (*Crocker* v. *Gulliper*, 44 Me. 491; *Isaack* v. *Clark*, 2 Bulstr. 306; *Fisher* v. *Kyle*, 27 Mich. 454); or a wagon is lent for one purpose and is used for another. Thus, where the defendant borrowed a carriage to use in a particular place, and instead of using it there, sent it heavily loaded to another place, whereby the carriage was damaged, it was held that the defendant was guilty of a conversion. *Hart* v. *Skinner*, 16 Vt. 138. So, where a slave was let to the defendant to work upon a farm, and he was put at work upon a steamboat and drowned, the defendant was held chargeable in trover for the value of the slave (*Richardson* v. *Dingle*, 11 Rich. [S. C.] 405); and the same rule applies to any species of property. *Fail* v. *McArthur*, 31 Ala. 26; *Moseley* v. *Wilkinson*, 24 id. 411; *Spencer* v. *Pilcher*, 8 Leigh, 565; *Perham* v. *Coney*, 117 Mass. 102. It is of no importance whether the article was injured by such unlawful use or not, except as affecting the question of damages, when the property has been returned. In any event the plaintiff would be entitled to recover nominal damages. *Delano* v. *Curtis*, 7 Allen, 476. The right of action in such cases does not grow out of the contract, and the wrong complained of is for an invasion of the plaintiff's rights, and not for a breach of the contract. "The distinction," said GRAY, J., in *Hall* v. *Corcoran*, 107 Mass. 251; 9 Am. Rep. 30, "between an action for misusing a horse in violation of the contract of letting, and an action for a conversion of the horse for driving it to a place without the contract, is clearly marked in the early cases in this court, in which, while the old rules of pleading prevailed, it was decided that an action for driving a horse beyond the distance agreed might be in trover, without regard to the question whether the property had been misused; and that an action for immoderately driving a horse upon a journey authorized or assented to by the owner, must be in case for a misfeasance, and not in trover for a conversion." *Wheelock* v. *Wheelwright*, 5 Mass. 104; *Homer* v. *Thwing*, 3 Pick. 492; *Rotch* v. *Hawes*, 12 id. 136; *Lucas* v. *Trum-*

*bull*, 15 Gray, 306. Therefore the right of action in the case of a conversion for exceeding the scope of the bailment is not affected by the invalidity of the contract under which the bailment arose, and even in those States where, by statute, contracts made upon the Sabbath are made invalid, or traveling upon the Sabbath is prohibited, a recovery may be had, if the bailment is exceeded. *Morton* v. *Gloster*, 46 Me. 520; *Woodman* v. *Hubbard*, 25 N. H. 67; *Hall* v. *Corcoran*, 107 Mass. 251. In the latter case, a horse was let upon Sunday to be driven to one place, and it was driven considerably beyond, and in returning to the place to which it was hired to go, the horse was considerably injured. In an action of trover therefor, it was objected to a recovery, that the letting having been made upon and for use upon Sunday, no recovery could be had. The court held otherwise, GRAY, J., saying: "The fact that the owner of property has acted, or is acting unlawfully in regard to it, is no bar to a suit by him against a wrongdoer, to whose wrongful act the plaintiff's own illegal conduct has not contributed." The fact that the plaintiff has taken pay for the use of the property, according to the provisions of the contract, in ignorance of the conversion, will not bar the action, but if, with knowledge of the conversion, before the bailment is ended, he does so, the weight of authority seems to be, that it is a waiver of the conversion, and a bar to an action therefor. Thus, in *Moseley* v. *Wilkinson*, 24 Ala. 411, it was held that, if a slave is let for a particular purpose, and is used for another, that the hirer is guilty of a conversion, and liable for the value of the slave; but that if, with full knowledge of the conversion before the expiration of the term, he receives the stipulated hire for the entire term, he is estopped from bringing trover. *Fail* v. *McArthur*, 31 Ala. 26; *Spencer* v. *Pilcher*, 8 Leigh, 565. But if he is not aware of the conversion until the bailment is ended, he cannot be estopped from a recovery because he receives the contract price. *Disbrow* v. *Ten Broeck*, 4 E. D. Smith (N. Y.), 397. But if he receives compensation for the unlawful, as well as the lawful use, he is estopped from bringing trover therefor. *Rotch* v. *Hawes*, 12 Pick. 136. When the owner has parted with his possession of goods by contract, for a certain time or purpose, he cannot maintain trover against a stranger for wrongfully taking them out of the hirer's possession, but the action should be brought by the hirer, unless the hirer by some wrongful act has forfeited his right to the possession of the property. *Gordon* v. *Harper*, 7 T. R. 9, 13; *Scott* v. *Newington*, 1 M. & R. 252. The owner's remedy in such cases is by an action on the case for an injury to his reversionary interest in the property. *Tancred* v. *Allgood*, 4 H. & N. 438; *Hall* v. *Pickard*, 3 Camp. 186. The hirer of a chattel acquires only the right to use,

and not the dominion of the property, and for this reason, if he alters or changes its character, the bailment is at an end, and he is liable for its conversion. *Bryant* v. *Wardell*, 2 Exch. 279, 282; *Fenn* v. *Bittleton*, 7 id. 159; *Farrant* v. *Thompson*, 5 B. & Ald. 826. So if he sells them, or sends them to an auctioneer to be sold. *Loeschman* v. *Mackin*, 2 Stark. 312. If goods or property lent to hire, are lost or stolen while in the hirer's possession, he cannot be charged with their conversion, unless he was guilty of gross negligence. He is only bound to take such care of the goods as a prudent man would take of his own. Thus if a horse is hired for a journey and is taken ill on the road, and the hirer calls in a farrier who prescribes for him, and the horse dies, he will not be responsible for its conversion, even though the death of the horse may have been the result of the farrier's injudicious treatment; but if he had neglected to call in a farrier, and ignorantly had prescribed for the horse himself, and through his unskillfulness the horse had died, he would have been responsible for its loss. *Deane* v. *Keate*, 3 Camp. 4; *Handford* v. *Palmer*, 2 Brod. & B. 359; 5 Moore, 79; *Bray* v. *Mayne*, 1 Gow. 1. Vol. 3, pp. 615, 616.

§ 15. **Conversion by an officer.** If an officer attaches the property of B upon a writ against A he is liable to B in trover therefor, if he refuses to give it up on demand (*Burgin* v. *Burgin*, 1 Ired. 453); and this is so whether he takes the property into his actual possession or not, if he, by statute, acquires a constructive possession of the property so that he can maintain an action against a person who takes it away. *Lockwood* v. *Bull*, 1 Cow. 322; *Brownell* v. *Manchester*, 1 Pick. 232; *Prescott* v. *Wright*, 6 Mass. 20; *Pierce* v. *Benjamin*, 14 Pick. 356. But, if he does not acquire any such lien under the attachment, by reason of a failure to comply with the requirements of the statute, or otherwise, trover will not lie against him (*Polley* v. *Lenox Iron Works*, 2 Allen, 182; *Fernald* v. *Chase*, 37 Me. 289); nor can he be made chargeable in trover if the property has been receipted for and is given up on demand (*Rand* v. *Sargent*, 23 Me. 326; *Fernald* v. *Chase*, 37 id. 289); nor if he does not disturb the possession of the goods or require a receipt to be given therefor. *Amadon* v. *Myers*, 6 Vt. 308. If an officer attaches personal chattels upon mesne process and delivers them to a receiptor, he does not lose his special property in them, and may take them out of the possession of the general owner, and consequently is not chargeable in trover to the debtor as whose property they were attached (*Bond* v. *Padelford*, 13 Mass. 394); but, if he does any thing that invalidates the attachment, he is liable in trover for the property by another attaching creditor, or even a person claiming by purchase from the debtor. *Bagley* v. *White*, 4 Pick. 395. Trover lies

against custom house officers for seizing and carrying away goods not seizable. So against an officer for attaching or levying upon goods exempt from attachment (*Sanborn* v. *Hamilton*, 18 Vt. 590; *Tinkler* v. *Poole*, 3 Wils. 146; *Mandolove* v. *Burton*, 1 Ind. [Cart.] 39); or for attaching the goods of a stranger and refusing to give them up until he receives security that they shall be forthcoming (*Phillips* v. *Hall*, 8 Wend. 610; *Wintringham* v. *Lafoy*, 7 Cow. 735); or for retaining an excess of goods levied upon by him, and applying them to his own use (*Waterbury* v. *Westervelt*, 9 N. Y. [5 Seld.] 598); or if he sells more goods than are necessary to satisfy an execution, if the goods are divisible. *Aldred* v. *Constable*, 6 Q. B. 381.

§ 16. **Conversion by claim of interest or right.** The mere assertion of title to, or an interest in property, when a person setting up the claim has not the possession or control of it, is not an act of conversion. *Lowry* v. *Walker*, 4 Vt. 81. But, if a person having property in his possession, either actually or constructively, claims a right in it, or to its possession, and retains control over it, he is guilty of an actionable conversion (*Fireman's Ins. Co.* v. *Cochran*, 27 Ala. 228; *Glaze* v. *McMillion*, 7 Port. [Ala.] 279; *Taylor* v. *Harrall*, 4 Blackf. 317; *Reid* v. *Colcock*, 1 N. & M. [S. C.] 592; *Reynolds* v. *Shuler*, 5 Cow. 323; *Gilman* v. *Hill*, 36 N. H. 311); as having the goods in his possession, if he threatens the rightful owner with violence, or that he will sue him if he attempts to take them away (*Crocket* v. *Beaty*, 8 Humph. 20; *Hare* v. *Pearson*, 4 Ired. 76); but an interference with another's property, which leaves the owner's rights undisputed, is not a conversion even though attended with injurious consequences to the owner. *Nelson* v. *Whetmore*, 1 Rich. 318.

§ 17. **Conversion by claim of lien.** If a person claims a lien upon property where none exists by law, and refuses to give it up until such pretended lien is satisfied, he is guilty of a conversion of, and liable in trover, for the property, as if an agistor of cattle should refuse to give them up until he was paid for their pasturage, because in law he has no lien (*Wills* v. *Barrister*, 36 Vt. 220; *Lewis* v. *Tyler*, 23 Cal. 364; *Goodrich* v. *Willard*, 7 Gray, 183; *Bissell* v. *Pierce*, 28 N. Y. 252); or if the keeper of a livery should refuse to give up a horse or carriage until paid for its keep (*Powers* v. *Hubbell*, 12 La. Ann. 413; *Miller* v. *Marston*, 35 Me. 153); or if one not a warehouseman or engaged in the business of storage refuses to give up goods that have been stored in his building (*Alt* v. *Weidenberg*, 6 Bosw. 176); or if a person, who has taken care of a horse for another, refuses to give it up until paid for his services. *Hoover* v. *Epler*, 52 Penn. St. 522.

So if a person, who has a lien upon property, refuses to give it up

upon other grounds, he thereby waives his lien, and if there is no validity in the claim set up by him to the property, he is liable for its conversion without a tender of the amount of his lien. Thus, in *Boardman* v. *Sill*, 1 Camp. 410, *n*, an action was brought for some brandy which lay in the defendant's cellars, and which, when demanded, he had refused to deliver up, saying that it was his own property. At this time certain warehouse rent was due the defendant on account of the brandy, of which no tender was made to him. It was contended in defense of the action that the defendant had a lien upon the brandy and until that was paid, trover would not lie therefor, but the court (Lord Ellenborough) held that, as the brandy had been detained on a different ground and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one, and consequently that the action would lie. So where a person refuses to give up property on demand, upon which he has a lien without setting up his lien, he is thereby treated as waiving the lien, although he sets up no specific ground for his refusal. *Hanna* v. *Phelps*, 7 Ind. 21; *Dows* v. *Morewood*, 10 Barb. 183; *Thatcher* v. *Harlan*, 2 Houst. (Del.) 178. In all cases, in order to be made available in defense in an action of trover, the lienor must have set up his lien specifically as one of the grounds upon which he predicated his refusal to deliver on demand, otherwise he cannot rely upon it in defense (*Picquet* v. *McKay*, 2 Blackf. 465; *Bean* v. *Bolton*, 3 Phil. [Penn.] 87), and if he has delivered the goods to the owner without payment of the lien, he loses it and cannot by afterward getting possession of the property claim to retain it until the lien is satisfied. In such a case he would be liable for a conversion of the property. *Perkins* v. *Boardman*, 14 Gray, 481; *King* v. *Indian Orchard Canal Co.*, 11 Cush. 231; *Bean* v. *Bolton*, 3 Phila. (Penn.) 87; *Picquet* v. *McKay*, 2 Blackf. 465.

§ 18. **Conversion by sale.** The most common illustration of dominion over property is by its sale, and it may be said that every sale of property absolutely constitutes a conversion if made without title or authority from the person in whom the true title is vested (*Harris* v. *Saunders*, 2 Strobh. Eq. 370, *n.*; *Gilman* v. *Hill*, 36 N. H. 311; *Webber* v. *Davis*, 44 Me. 147; *Clark* v. *Whitaker*, 19 Conn. 319; *Duncan* v. *Stone*, 45 Vt. 118; *Loeschman* v. *Machin*, 2 Stark. 311), and this is so, whether the property is sold by an individual as such, or by an officer (*Aldred* v. *Constable*, 6 Q. B. 381; *Grainger* v. *Hill*, 4 Bing. N. C. 221), and the person purchasing acquires no title thereto, and consequently is equally liable for its conversion as the person selling (*Clark* v. *Wells*, 45 Vt. 4; 12 Am. Rep. 187; *Clark* v. *Rideout*, 39 N. H. 238; *Carter* v. *Kingman*, 103 Mass. 517), and it is a matter

of no consequence so far as the question of liability is concerned whether the purchaser was ignorant of the facts or not. *Morrill* v. *Moulton*, 40 Vt. 242; *Johnson* v. *Powers*, 40 id. 611; *West Jersey Co.* v. *Trenton R. R. Co.*, 32 N. J. Law, 517; *Tallman* v. *Turck*, 26 Barb. 567; *Hoffman* v. *Carow*, 22 Wend. 285; *Rogers* v. *Huie*, 1 Cal. 429; *Cooper* v. *Newman*, 45 N. H. 339; *Dixon* v. *Caldwell*, 15 Ohio St. 412. Mere possession of property by a person affords no evidence of ownership of or authority to sell it, and a person purchases it of him without ascertaining where the true title is at his peril, and however honestly mistaken, he will be liable to the true owner for a conversion of the property. *Taylor* v. *Pope*, 5 Cold. 413; *Gilmore* v. *Newton*, 9 Allen, 171; *Spraights* v. *Hawley*, 39 N. Y. 441. This is also the rule where property is sold conditionally, that is, where the title is reserved to the vendor until the property is fully paid for. In such a case the person holding the property can give no title thereto by a sale, even though he has paid a part of the purchase-money. So long as *any*, even a small portion of the purchase-money remains unpaid, the title is in the vendor and he may pursue the property and recover its full value in trover of one who purchases it of his vendee. *Duncan* v. *Stone*, 45 Vt. 118; *Clark* v. *Wells*, id. 4; 12 Am. Rep. 187.

Where, however, there is a sale of property absolutely, but which is voidable as between the vendor and vendee because of fraud on the part of the vendee, while the vendor can rescind the contract as to the vendee and maintain trover against him therefor (*Ayres* v. *French*, 41 Conn. 142; *Dow* v. *Sanborn*, 3 Allen, 181; *Hall* v. *Naylor*, 18 N. Y. 588; *Ferguson* v. *Carrington*, 9 B. & C. 59; *Read* v. *Hutchinson*, 3 Camp. 352; *Kilby* v. *Wilson*, Ry. & Moo. 178; *Noble* v. *Adams*, 7 Taunt. 89), yet, he cannot maintain trover against a purchaser from his vendee therefor, and the reason is that as the fraudulent purchaser acquires a title under his purchase, although defeasible if he passes that to an innocent purchaser before the title has been defeated by a rescission of the contract by the seller, it is then too late for the seller to elect to treat the sale as void, because the rights of innocent third persons have intervened. *Williamson* v. *Russell*, 39 Conn. 406; *Cook* v. *Gilman*, 34 N. H. 556; *Titcomb* v. *Wood*, 38 Me. 561; *Willoughby* v. *Moulton*, 47 N. H. 207; *Coggill* v. *R. R. Co.*, 3 Gray, 548; *White* v. *Garden*, 10 C. B. 927.

§ 19. **Stolen goods.** A thief acquires no title to goods stolen by him, and, except in the case of negotiable securities in the hands of a *bona fide* purchaser for value, the owner may maintain trover against any person who purchases it from him, or otherwise comes into its possession. *Breckenridge* v. *McAfee*, 54 Ind. 141. It has been held

that an auctioneer, selling stolen goods at public sale, is liable for their conversion, although ignorant of the fact that they were stolen. *Hoffman* v. *Carow*, 22 Wend. 285; *Lee* v. *Bayes*, 18 C. B. 599; *White* v. *Spettigue*, 13 M. & W. 603. The only question of any importance in this connection is, whether the action can be maintained until after the conviction of the thief. By the Stat. 7 & 8 Geo. 4, c. 29, § 57, provision was made that no such action should be maintained until the thief had first been convicted, when the courts were empowered to award a restitution of the property to the owner. In England under this statute it is held that an order of restitution is not necessary to enable the owner to maintain trover *after* a conviction. *Scattergood* v. *Sylvester*, 15 Q. B. 511. But a singular condition of the law growing out of this statute is, that during the interval between the commission of the felony and the conviction the purchaser has a *prima facie* title liable to be defeated by the conviction (*Peer* v. *Humphrey*, 2 Ad. & El. 495; Addison on Torts [Wood's ed.], § 493); and that persons who purchase during that period, in market overt, and sell again *before* conviction, cannot be subjected to an action for taking and converting the property (*Gimson* v. *Woodfull*, 2 C. & P. 41; *Horwood* v. *Smith*, 2 T. R. 750); and this is based upon the theory that the title of the owner, during the period between the larceny and the conviction, is suspended, and only revests when the thief is convicted. But this rule does not apply except as to purchasers in market overt. *White* v. *Spettigue*, 13 M. & W. 603; *Lee* v. *Bayes*, 18 C. B. 599; 37 Eng. Law & Eq. 406.

In Pennsylvania it is held that even the thief, who is indicted for the larceny, may be sued in trover by the owner, the civil suit being triable only, until after the criminal proceedings are terminated (*Keyser* v. *Rogers*, 50 Penn. St. 275; *Hutchinson* v. *Bank of Wheeling*, 1 id. 42); and in Illinois it is held that trover will lie against an innocent purchaser without a prosecution of the thief (*Newkirk* v. *Dalton*, 17 Ill. 413); and in an English case (*Lee* v. *Robinson*, 37 Eng. L. & Eq. 406; 18 C. B. 599, 609, *note*), a similar doctrine is held, and the same rule prevails in Vermont (*Courtis* v. *Cane*, 32 Vt. 232); and it is not the rule in this country that a conviction, or even an attempt at conviction, is an essential preliminary to the bringing of the action. *Beazley* v. *Mitchell*, 9 Ala. 780; *Pettingill* v. *Rideout*, 6 N. H. 454; *White* v. *Fort*, 3 Hawks (N. C.), 251; *Lofton* v. *Vogles*, 17 Ind. 105; *Boston, etc., R. R. Corp.* v. *Dana*, 1 Gray, 83, 100; *Ballew* v. *Alexander*, 6 Humph. (Tenn.) 433, and numerous other cases.

## ARTICLE III.

### OF DEMAND AND REFUSAL.

**Section 1. When a demand is necessary.** When property came lawfully into the hands of a person, that is, when he has received it from the owner, or some person authorized to put it into his possession, he cannot be held chargeable for its conversion until the owner, or some person authorized by him, has demanded the same of him (*Hall* v. *Robinson*, 2 Comst. 293; *Wilton* v. *Girdlestone*, 5 B. & Ald. 847; *Morris* v. *Bills*, Wright [Ohio], 343; *Wilson* v. *Cook*, 3 E. D. Smith [N. Y.], 252; *Hardy* v. *Keeler*, 56 Ill. 152; *Witherspoon* v. *Blewett*, 47 Miss. 570; *Waring* v. *Penn. R. R. Co.*, 76 Penn. St. 491; *Kennet* v. *Robinson*, 2 J. J. Marsh. 97); and the same rule prevails where a person becomes an involuntary bailee of another's goods. Thus, where the plaintiff's sheep, by accident, become mixed with those of the defendant, and he, after due diligence, cannot separate them, he cannot be made chargeable in trover until a demand has been made upon him for the sheep (*Cutter* v. *Fanning*, 2 Iowa, 580); and the same rule prevails when a person stands in the relation of a gratuitous bailee (*Polk* v. *Allen*, 19 Mo. 467; *Brown* v. *Cook*, 9 Johns. 367; *Kennet* v. *Robinson*, 2 J. J. Marsh. 84); and, generally, in all cases where the defendant came lawfully into the possession of property, the plaintiff must either establish an actual conversion, or must show that he demanded the goods, and that the defendant neglected or refused to deliver them (*Sluyter* v. *Williams*, 37 How. [N. Y.] 109; *Yeager* v. *Wallace*, 57 Penn. St. 365; *Sherry* v. *Picken*, 10 Ind. 375; *Carleton* v. *Lovejoy*, 54 Me. 445; *Thompson* v. *Rose*, 16 Conn. 71; *Chapin* v. *Siger*, 4 McLean [C. C.], 378; *Stewart* v. *Spedden*, 5 Md. 433; *Mitchell* v. *Williams*, 4 Hill, 13; *Andrews* v. *Shattuck*, 32 Barb. 396); and in a case of intermingling of goods, it is held that there must be a demand, even though there has been a previous conversion. *Bond* v. *Ward*, 7 Mass. 123. So when goods have been sold to a person who procured them upon credit by fraud, the vendor must demand the goods of him before suit brought. *Lacker* v. *Rhodes*, 45 Barb. 499. So where a person has sold goods conditionally, retaining the title until paid for, and they are attached as the property of the vendee, and the vendor assigns the claim, the assignor must demand the property of the officer before suit brought. *Hicks* v. *Cleaveland*, 39 Barb. 573; *Wilson* v. *Cook*, 3 E. D. Smith (N. Y.), 252.

§ 2. **When a demand is not necessary.** When a person came into the possession of property wrongfully, or tortiously, as by force,

or through one who had no title thereto, a demand is not necessary (*Woodbury* v. *Long*, 8 Pick. 543; *Paige* v. *O'Neal*, 12 Cal. 483; *Farrington* v. *Payne*, 15 Johns. 431; *Jones* v. *Dugan*, 1 McCord, 428; *Gentry* v. *Madden*, 3 Ark. 127; *Gilmore* v. *Newton*, 9 Allen, 171); as where a servant on leaving his master's service takes away the master's goods (*Pilsbury* v. *Webb*, 33 Barb. 213); or where the original taking amounted to a trespass (*Matheney* v. *Johnson*, 9 Mo. 232); or the property was purchased of one who had no title (*Deering* v. *Austin*, 34 Vt. 330; *Hyde* v. *Noble*, 13 N. H. 494); or the property was obtained by fraud, and the person purchased it of the fraudulent purchaser, with knowledge of the fraud (*Ryan* v. *Brant*, 42 Ill. 78; *Thurston* v. *Blanchard*, 22 Pick. 18; *Luckey* v. *Roberts*, 25 Conn. 486); or where one has purchased stolen goods, although ignorant of the fact (*Pease* v. *Smith*, 61 N. Y. 477; *Courtis* v. *Cane*, 32 Vt. 232); or when the property was obtained by means of false representations (*Bruner* v. *Dyball*, 42 Ill. 34); or where property is obtained by duress or threats (*Foshay* v. *Ferguson*, 5 Hill, 154); or where a promise on the part of the defendant to return the goods within a certain time is shown, which he has not kept (*Durell* v. *Mosher*, 8 Johns. 445); or where an executor or administrator has appropriated as a part of the estate, property which by law passes to the widow (*Curd* v. *Curd*, 9 Humph. 171); or where property is taken by mistake, as, where the defendant carried away the hay of another from a railroad depot supposing it to be his own (*Bartlett* v. *Hoyt*, 33 N. H. 151); or where one aids a person in selling property that he holds only under a conditional sale. *Fisk* v. *Ewen*, 46 N. H. 173. A demand is never necessary, where an *actual* conversion is shown (*Himes* v. *McKinney*, 3 Mo. 382; *Davidson* v. *Donadi*, 2 E. D. Smith [N. Y.], 121; *Jewett* v. *Partridge*, 12 Me. 243; *Calkins* v. *Lockwood*, 17 Conn. 154; *Garvin* v. *Luttrell*, 10 Humph. 16; *Dudley* v. *Sawyer*, 41 N. H. 326; *Dunnahoe* v. *Williams*, 24 Ark. 264; *Earle* v. *Van Buren*, 7 N. J. Law, 344; *Newsum* v. *Newsum*, 1 Leigh [Va.], 86); as, where the property has been misused or abused (*Maguyer* v. *Hawthorn*, 2 Harr. [Del.] 71); or appropriated, and on the trial the defendant sets up title in himself (*Powell* v. *Olds*, 9 Ala. 861); or where a wrongful use of the property is shown (*McPherson* v. *Neuffer*, 11 Rich. [S. C.] 267), or has been converted to his own use (*Dunnahoe* v. *Williams*, 24 Ark. 264; *Dudley* v. *Sawyer*, 41 N. H. 326); or when the property has been sold (*McPherson* v. *Neuffer*, 11 Rich. 267; *Pease* v. *Smith*, 61 N. Y. 477); even under an order of court, when the order is a nullity (*Hall* v. *Chapman*, 35 Ala. 553); or upon an execution (*Robinson* v. *McDonald*, 2 Ga. 116); or where property sold conditionally is sold by the conditional pur-

chaser before the condition is performed (*Whipple* v. *Gilpatrick*, 19 Me. 427); or where a distress is sold by an officer after the time limited by law (*Pierce* v. *Benjamin*, 14 Pick. 356); or indeed in any case where an actual conversion can be established without a demand and refusal. *Gilmore* v. *Newton*, 9 Allen, 171; *Garvin* v. *Luttrell*, 10 Humph. 16; *Davison* v. *Donadi*, 2 E. D. Smith, 121. "After a sale has been made by the defendants," says DWIGHT, C., in *Pease* v. *Smith*, 61 N. Y. 477, 481, "They have assumed to be the owners and will be estopped to deny, in an action by the lawful owner, the natural consequences of their act, and to resist an action for the value of the goods. * * * In *Harris* v. *Saunders*, 2 Strobh. Eq. 370, the defendant having the property in his own hands by purchase, from one who had no title, sold it to another who carried it beyond the plaintiff's reach, and received the purchase-money. These acts were held to amount to a conversion though the defendant was not aware of the plaintiff's title. As according to these views the conversion took place *at the moment of the unauthorized sale* * * no demand was necessary * * *Esmay* v. *Fanning*, 9 Barb. 176; *Vincent* v. *Conkling*, 1 E. D. Smith, 203; *Munger* v. *Hess*, 28 Barb. 75; *Brown* v. *Beason*, 24 Ala. 466. After a wrongful taking and carrying away of property, *the cause of action has become complete without further act on the plaintiff's part. Brewster* v. *Silliman*, 38 N. Y. 423; *Hanmer* v. *Wilsey*, 17 Wend. 91; *Otis* v. *Jones*, 21 id. 394." The same rules apply to all species of acts amounting to a conversion, and it will therefore be profitable to refer to Art. 2, *ante*, pp. 163, 164, to ascertain when a demand should be made or may be dispensed with.

Where goods have been converted by a bailee, it is presumed to be wrongful, and trover may be maintained without a previous demand (*Waring* v. *Penn. R. R. Co.*, 76 Penn. St. 491; *Kyle* v. *Gray*, 11 Ala. 233); although, in the first instance, the property came lawfully to the defendant. Id.

§ 3. **What is a sufficient demand.** A demand, in order to be operative, and to afford evidence of a conversion, must be so specific as to leave no doubt as to what property it related (*Abington* v. *Lipscomb*, 1 Q. B. 776, 780); and the question as to whether, if the demand is too large, that is, embraces more property than the owner is entitled to, is sufficient, as to those to which he *is* entitled, has not been definitely settled. Mr. Addison, in his work on Torts, lays down the doctrine that it would not be, and predicates a doctrine upon *Abington* v. *Lipscomb*, 1 Q. B. 766, 780; but the case does not sustain his position. It is true that in that case the demand was for *seven* heriots, when the plaintiff was only entitled to five, but the decision of the court proceeded

upon the ground that the demand being for seven, when he was only entitled to five, that it could not be held good because he did not designate *which five* he claimed, and leaves the question as to the effect of a demand that is too large, wholly undetermined. In Massachusetts, in *Delano* v. *Curtiss*, 7 Allen, 470, the question was considered, and in that case it was held that it was a question for the jury, whether a refusal to deliver under such a demand was such a clear and absolute refusal to deliver the property to which the plaintiff *was* entitled, as to amount to a conversion, and that *per se* the refusal to deliver was not such an assumption of control or dominion over the property, to the exclusion, or in defiance of the plaintiff's rights, as amount to a conversion.

In Vermont, in *Gragg* v. *Hull*, 41 Vt. 217, 222, it was held, that the fact that the demand is too large will not excuse the defendant from delivering all the property that the plaintiff was entitled to have, and, from these cases, which seem to be the only ones in which the question has been directly raised, there seems to be no doubt that the rule is, that, when a demand is too large, the defendant is nevertheless bound to deliver up such property as he may have in his hands, covered by the demand, belonging to the demandant, and failing to do so, is liable therefor *unless* the demand is so vague, as to leave it uncertain to what specific property it relates. A demand of a few articles not owned will not vitiate. *Marine Bank* v. *Fiske*, 71 N. Y. (26 Sick.) 354. If a written demand is sent by mail, the burden is upon the plaintiff to show that the defendant received it long enough before the suit was brought, to enable him to deliver the property *and that he absolutely refused to deliver.* A demand by mail cannot be set up, except where such proof can be made, because the defendant is not bound to reply by mail, nor is he bound to go out of his way to deliver the property, and a failure to do either affords no evidence of a conversion. *Pattee* v. *Gilmore*, 18 N. H. 460. And a demand in writing, left at the defendant's house, is not sufficient, unless the circumstances proved are such as to raise a presumption that he received it before action brought. *White* v. *Demary*, 2 N. H. 546.

A demand must be made by the owner personally or by some person authorized by him to make it, and, where it is made by an agent, the defendant may require reasonable proof of his authority to receive the property, and unless reasonable proof is furnished, the demand and refusal afford no evidence of a conversion. *Blankenship* v. *Berry*, 28 Tex. 448; *Solomons* v. *Dawes*, 1 Esp. 83. But if the defendant does not question the authority of the agent, but predicates his refusal upon other grounds, the agent is not bound to exhibit his authority.

*West* v. *Tupper*, 1 Bailey (S. C.), 193. The plaintiff himself is not, upon making a demand, bound to establish, or exhibit his title to the property. *Ratcliffe* v. *Vance*, 2 Const. Ct. (S. C.) 239. But where there is a reasonable doubt as to the title, the question, as to whether the defendant's refusal to deliver *upon that ground* is evidence of a conversion, will depend upon the circumstances, and it will be left for the jury to say, whether, under all the circumstances, he was justified in his refusal, and if so, the demand and refusal affords no evidence of a conversion. *Robinson* v. *Burleigh*, 5 N. H. 225; *Carroll* v. *Mix*, 51 Barb. 212; *Dowd* v. *Wadsworth*, 2 Dev. (N. C.) 130. Thus, in *Hyde* v. *Manchester*, tried at Rutland county court, Vt., at Sept. Term, 1857, the defendant received from a person, who had conditionally bought a span of horses of the plaintiff, the horses in question, to pasture for him. Shortly after the horses were left with him, the plaintiff demanded the horses of the defendant, claiming a right to them, because the purchaser had broken the conditions of purchase. The defendant declined to give them up until he had had an opportunity to consult his attorney to ascertain what he ought to do, and the same day he went to consult his attorney upon that point, and, while on his way, a writ in favor of the plaintiff declaring in trover for the horses was served upon him. While he was absent upon this mission, the horses were stolen out of the pasture, and never heard of afterward. Upon the trial, Peck, J., held, and charged the jury that, if the defendant entertained a *bona fide* doubt as to the plaintiff's title to the horses, he was entitled to a reasonable time to determine what he should do, and that if he was guilty of no unreasonable delay in the matter, and the horses were taken out of his possession without his connivance or consent before such reasonable time had elapsed, he could not be held chargeable for their conversion by his refusal to deliver under the demand made, and this seems to be the rule generally held. *Pillott* v. *Wilkinson*, 3 H. & C. 345; *Carroll* v. *Mix*, 51 Barb. 212; *Wilson* v. *Cook*, 3 E. D. Smith, 252; *Ingalls* v. *Bulkley*, 15 Ill. 224; *Ogle* v. *Atkinson*, 5 Taunt. 759; *Spence* v. *Mitchell*, 9 Ala. 744.

A demand of payment for the goods is held to be equivalent to a demand for the goods themselves; if payment is refused, and a refusal of payment is put upon the ground that nothing is due, it is equivalent to a refusal to deliver the goods. *LaPlace* v. *Aupoix*, 1 Johns. Cas. 406.

A demand made upon a servant or an agent, who is charged with the custody of the property, and of delivering property for the master, is sufficient, as a demand made upon a baggage-master for baggage belonging to a passenger (*Cass* v. *N. Y., etc., Cent. R. R. Co.*, 1 E. D. Smith, 522); or upon a painter's servant for a carriage left with the

master to be painted (*Buxton* v. *Baugham*, 6 C. & P. 674); or upon a pawnbroker's clerk for property pawned with his master (*Jones* v. *Hart*, 2 Salk. 441); or a ship-master having the custody of goods transported on the ship. *Schuster* v. *McKellar*, 7 El. & Bl. 704. But in the case of a mere servant who has no general or special authority in reference to the goods, and who has not been instructed in reference to the matter by his master, a refusal by him to deliver on demand would not be a refusal by the master, and such a demand would have no validity, as in all cases where the demand is made upon an agent the burden is on the plaintiff to establish his authority to act in that respect for the master or principal. *Gray* v. *Gillian*, 15 Ill. 453. Where two persons are in the joint possession of property, as where it is in the possession of a firm, or in the joint possession of the tortfeasors, a demand upon one is equivalent to a demand upon all, but if they are not partners or in the joint possession of the property, a demand should be made upon each (*Ball* v. *Larkin*, 3 E. D. Smith [N. Y.], 555); but where a partnership is dissolved, a demand must be made of all the partners. *Sturges* v. *Keith*, 51 Ill. 451. A demand made by one of two joint owners is sufficient, but if the property demanded was received from A by B, and by B deposited with C, to be held for the joint account of both, they, however, not being joint owners, both should make demand. *May* v. *Harvy*, 13 East, 197; *Nathan* v. *Buckland*, 2 Moore, 153.

A qualified demand, as "I shall have to take the property from you if I cannot get my money any other way," is not a sufficient demand to support an action where a demand is necessary (*Monnot* v. *Ibert*, 33 Barb. 24); nor if it was coupled with a condition as, that the goods shall be delivered in as good a condition as when received (*Rushworth* v. *Taylor*, 3 Q. B. 699, 700); nor if it was left subject to the performance of some act by the plaintiff, as where the plaintiff promised to furnish an inventory of the property. *Breese* v. *Bange*, 2 E. D. Smith (N. Y.), 474.

§ 4. **What is not a sufficient demand.** As to when a demand is insufficient, see § 3, *ante*, pp. 207, 208.

§ 5. **Effect of a demand.** A demand and refusal to deliver is not a conversion, nor evidence of one, when the party upon whom it is made did not at that time have the property in his possession or under his control. *Tinker* v. *Morrill*, 39 Vt. 477; *Hunt* v. *Kane*, 40 Barb. 638. It is only evidence of conversion where it was within the power of the defendant to deliver it. *Tinker* v. *Morrill*, 39 Vt. 447, 480. In the latter case it is plenary evidence of conversion. *Irish* v. *Cloyes*, 8 Vt. 30; *Gragg* v. *Hull*, 41 id. 222, 417. It is not even evidence of a

conversion, unless the jury are satisfied of the plaintiff's title and of the defendant's possession (*Beckman* v. *McKay*, 14 Cal. 250; *Yale* v. *Saunders*, 16 Vt. 243; *Davis* v. *Buffum*, 51 Me. 160); or of his power to give it up. *Johnson* v. *Couillard*, 4 Allen, 446; *Fillmore* v. *Hubbard*, 31 How. 424. Even though property is at a distance from the place where the demand is made, it is evidence of a conversion if the defendant absolutely refuses to give it up (*Clark* v. *Hale*, 34 Conn. 398; *Gottlieb* v. *Drummond*, 3 Col. 374); but if the goods are not present at the place of demand, although in the defendant's possession, if he does not refuse, but merely neglects to give them up, he cannot be made chargeable for their conversion. *Bowman* v. *Eaton*, 24 Barb. 528; *Whitney* v. *Slauson*, 30 id. 276. When the defendant absolutely refuses to give up property demanded, it is full evidence of a conversion, unless rebutted or explained. *Dietus* v. *Fuss*, 8 Md. 148; *Magee* v. *Scott*, 9 Cush. 148. A demand is not a waiver of any previous conversion. *Manwell* v. *Briggs*, 17 Vt. 176; *Cobb* v. *Wallace*, 5 Coldw. (Tenn.) 539.

§ 6. **When a refusal is a conversion.** When a person having possession of property absolutely refuses to deliver it up, on demand, he thereby becomes guilty of a conversion (*Lockwood* v. *Bull*, 1 Cow. 322; *Pullen* v. *Bell*, 40 Me. 314; *Davis* v. *Taylor*, 41 Ill. 405; *Hinckley* v. *Baxter*, 13 Allen, 139; *Thompson* v. *Rose*, 16 Conn. 71); unless the contrary be shown. *Isaac* v. *Clark*, 2 Bulstr. 314; *Watt* v. *Potter*, 2 Mas. (C. C.) 77, 81. An unqualified refusal is generally regarded as conclusive evidence of a conversion, but the presumption arising therefrom may be overcome by proof that the refusal was qualified, and that the qualification was a reasonable one, and in that event, it will not be evidence of a conversion. Thus, in the language of Coke, J., in *Isaac* v. *Clark*, 2 Bulstr. 314, "if A, into whose possession goods happen to come, being ignorant that B is the true owner, refuses to deliver them to B until he proves that he is the real owner, such qualified refusal is not evidence of a conversion." For instances in which qualified refusals have been held not to amount to a conversion, see *Alexander* v. *Southey*, 5 B. & Ald. 247; *Mires* v. *Solebay*, 2 Mod. 242; *Carroll* v. *Mix*, 51 Barb. 212; *Robinson* v. *Burleigh*, 5 N. H. 225; *Ingalls* v. *Bulkley*, 15 Ill. 224; *Griffin* v. *Alsop*, 4 Cal. 406; *Dowd* v. *Wadsworth*, 2 Dev. (N. C.) 130; *Delano* v. *Curtis*, 7 Allen, 470. But if the refusal is absolute, and no reason is given therefor, it is *per se* evidence of a conversion. *West* v. *Tupper*, 1 Bailey (S. C.), 193; *Nelson* v. *King*, 25 Tex. 655; *Judah* v. *Kemp*, 2 Johns. Cas. 411; *O'Donaghue* v. *Corby*, 22 Mo. 394; *Davis* v. *Taylor*, 41 Ill. 405; *Hinckley* v.

*Baxter*, 13 Allen, 139; *Overstreet* v. *Nunn*, 36 Ala. 649; *Spence* v. *Mitchell*, 9 id. 744; *Stearns* v. *Houghton*, 38 Vt. 583; *Morris* v. *Thomson*, 1 Rich. (S. C.) 65; *Chamberlin* v. *Shaw*, 18 Pick. 278; *Sargent* v. *Gile*, 8 N. H. 325; *Miller* v. *Grove*, 18 Md. 242; *Boothe* v. *Estes*, 16 Ark. 104; *Irish* v. *Cloyes*, 8 Vt. 28, 33; *Chase* v. *Blaisdell*, 4 Minn. 90; *Ferguson* v. *Clifford*, 37 N. H. 86. And one cannot absolutely refuse to deliver, and then upon the trial show matters in justification, short of a right in himself. *Spence* v. *Mitchell*, 9 Ala. 744; *Ingalls* v. *Bulkley*, 15 Ill. 224; *O'Donaghue* v. *O'Connell*, 22 Mo. 394; In order to amount to an absolute refusal it is not necessary that the defendant should say that he will not deliver the property; it is enough if he says or does that which is equivalent thereto. Thus where a person who had purchased goods of one who had no right to sell them, upon a demand by the owner, said he should not deliver them up at present, having bought them of the vendor supposing them to be his; and afterward held the goods for seven days and did not deliver them, it was held that his refusal in connection with his neglect to deliver within a reasonable time, was sufficient evidence of a conversion. *Sargent* v. *Gile*, 8 N. H. 325. If the defendant imposes a condition as, that he will not deliver, unless the plaintiff will do certain things that he has no right to require, as, that he will not deliver without the plaintiff brings an order from a certain person (*Davies* v. *Vernon*, 6 Q. B. 443, 450; *Alexander* v. *Southey*, 5 B. & Ald. 247), or until certain charges due from certain persons are paid (Id.), or, unless a receipt in full is given (*Barnett* v. *Crystal Pal. Co.*, 2 F. & F. 443); or that he shall do nothing but what the law requires (*Davies* v. *Nicholas*, 7 C. & P. 339), or that he will deliver if the defendant gives an inventory and receipt. *Cobbett* v. *Clutton*, 2 C. & P. 471. In all these cases, the imposition of a condition was held equivalent to a refusal, and sufficient to amount to a conversion. But if, after refusal, and before action brought, the defendant repents, and delivers the property, the demand and refusal are not evidence of a conversion (*Hayward* v. *Seaward*, 1 M. & S. C. 459), or even if he signifies to the plaintiff his willingness to deliver the property claimed. *Powers* v. *Bassford*, 19 How. (N. Y.) 309; *Wells* v. *Kelsey*, 15 Abb. 53.

§ 7. **When a refusal is not evidence of a conversion.** When a refusal to deliver may be considered only as the result of a reasonable hesitation in a doubtful matter, it is not sufficient evidence to establish a conversion (*Robinson* v. *Burleigh*, 5 N. H. 225; *Carroll* v. *Mix*, 51 Barb. 212; *Spence* v. *Mitchell*, 9 Ala. 744; *Alexander* v. *Southey*, 5 B. & Ald. 247; *Isaac* v. *Clark*, 2 Bulstr. 312), and the same is true

when the refusal is qualified, and the qualification is reasonable. Id. *Green* v. *Dunn*, 3 Camp. 215; *Solomon* v. *Dawes*, 1 Esp. 83. Thus, where a deed was demanded of the defendant who said he would not deliver it up, but that it was in the hands of his attorney who had a lien upon it for a small sum of money due him, the court held that this did not furnish evidence of a conversion because, from the very terms of the refusal, it appeared that the defendant did not have the power to deliver the deed. *Smith* v. *Young*, 1 Camp. 439. In this case Lord Ellenborough said, "The defendant would have been guilty of a conversion if it had been in his power. There must be an actual *tort. To make a demand and refusal sufficient evidence of a conversion, the party, when he refuses, must have had it in his power to deliver up, or detain the article demanded.*" Therefore, if he did not, at the time of demand, have the possession or control of the property, his refusal is not evidence of a conversion. *Tinker* v. *Morrill*, 39 Vt. 477; *Beckman* v. *McKay*, 14 Cal. 250. Nor is it evidence of a conversion, when it is evident that he has been guilty of none, as, where trees are cut down and left lying on the plaintiff's land (*Mires* v. *Solebay*, 2 Mod. 242; *Wilbraham* v. *Snow*, 2 Saund. 47; Buller's N. P. 44), and, unless the jury find a conversion, the court will not intend one. *Rex* v. *Haughton*, 1 Str. 83, 85. So if an involuntary bailee of goods, when they are demanded of him, says he will have nothing to do with them, and he interposes no obstacles to the owner taking them, his declaration will not amount to a conversion. *Hawkes* v. *Dunn*, 1 Cr. & J. 519, 527. So, where goods are left by some person unknown, upon the defendant's premises, and upon demand made, he refuses to give them up without proof of the demandant's ownership, and he does not intermeddle with the property, he cannot upon such refusal be held guilty of a conversion (*Green* v. *Dunn*, 3 Camp. 215, *n.*), and the same is the rule when a demand is made upon the finder of goods (*Isaack* v. *Clarke*, 1 Roll. 130), and, generally, if a person merely has property in his possession, but has never claimed title thereto or converted it, or asserted any claim therein inconsistent with the rights of the owner, but upon demand being made by one as to whose claim he knows nothing, merely hesitates, regarding the title as doubtful, he cannot for that be held chargeable with the conversion of the property. *Yale* v. *Saunders*, 16 Vt. 243; *Robinson* v. *Burleigh*, 5 N. H. 225; *Beckley* v. *Howard*, 2 Brev. 94. Thus, where demand was made by a stranger upon a servant to deliver up goods he has received from his master, and he refused to deliver them without previous application to his master, the court held that this qualified refusal was reasonable and proper. *Alexander* v. *Southey*, 5 B. & Ald. 247. But if, after

having had an opportunity to receive the master's instructions, he still refuses, relying on the master's rights, he is guilty of a conversion if the master's rights fail. *Lee* v. *Robinson*, 37 Eng. L. & Eq. 406. And to the same effect see *Sheridan* v. *New Quay Co.*, 4 C. B. (N. S.) 618; *Lee* v. *Bayes*, 18 C. B. 509; *Pillot* v. *Wilkinson*, 3 H. & C. 345; *Solomons* v. *Dawes*, 1 Esp. 83; *Woodley* v. *Coventry*, 2 H. & C. 164. So, when the demand is made by an agent, a refusal to deliver until his authority is established (*Watt* v. *Potter*, 2 Mas. [C. C.] 77), or, if the refusal is upon the ground that the property is held by agreement as collateral security (*McIntosh* v. *Summers*, 1 Cranch's C. C. 41), or that he is merely an agent for another (*Carey* v. *Bright*, 58 Penn. St. 70), or that he has been summoned as trustee on account of the goods (*Fletcher* v. *Fletcher*, 7 N. H. 452), or that he holds them as an officer of the customs for a breach of revenue laws (*Barnes* v. *Taylor*, 29 Me. 514), or that he does not know that the demandant has a right to the property, he having received it from another (*Carroll* v. *Mix*, 51 Barb. 212; *Zachary* v. *Pace*, 9 Ark. 212), does not amount to a conversion. Nor does a mere refusal to deliver the property at the demandant's house or place of business amount to a conversion, even though it is his duty to deliver it there, if he makes no claim to the goods for himself. *Farrar* v. *Rollins*, 37 Vt. 295. Thus, it will be seen that a refusal to deliver, in order to be evidence of a conversion, must be unqualified and absolute, or of such a character that it is so in effect, or that the qualification must be unreasonable, and such as the defendant had no right to make. *Zachary* v. *Pace*, 9 Ark. 212; *Fletcher* v. *Fletcher*, 7 N. H. 452; *Carey* v. *Bright*, 58 Penn. St. 70; *Dent* v. *Chiles*, 5 S. & P. (Ala.) 383.

## ARTICLE IV.

### OF THE REMEDY BY ACTION.

**Section 1. In general.** From what has been stated in the preceding sections, it will be seen that, whenever there is a wrongful taking and detention of property, the owner may sue either in trespass or trover therefor, but that when the defendant came lawfully into possession and is only guilty of a wrongful detention, trover is the only remedy, and that trespass will not lie. See *ante*, p. 128, Art. 1, § 1. When the wrong-doer has sold the property, the owner may also waive the tort, and sue for money had and received, the law under such circumstances from the sale implying a promise to pay therefor (*Cushman* v. *Jewell*, 7 Hun [N. Y.], 525; *Tyson* v. *Baker*, 7 Lans. 511); and if he has appropriated the property to his own use, he may sue for goods sold

and delivered (*Lythgoe* v. *Vernon*, 7 H. & N. 180; *Brewer* v. *Sparrow*, 7 B. & C. 310; *Hawk* v. *Thorn*, 54 Barb. 164; *Cooper* v. *Shepherd*, 3 C. B. 266; *Foreman* v. *Neilson*, 2 Rich. Eq. [S. C.] 287; *Goss* v. *Mather*, 2 Lans. [N. Y.] 283; *Wellington* v. *Drew*, 16 Me. 51; *Gilmer* v. *Ware*, 19 Ala. 252; *Firemen's, etc., Ins. Co.* v. *Cochran*, 27 Ala. 228); but, generally, trover, or in those States where trover does not exist as a distinctive form of action, an action for the conversion of the goods will be found the preferable remedy.

§ 2. **Who may sue.** An action of trover should always be brought in the names of those who are entitled to its *immediate* possession, whether such person be the general owner or a person having a special property or interest therein (*Beaty* v. *Gibbon*, 16 East, 116), as by a lessee of the property (*Gordon* v. *Harper*, 7 T. R. 13; *Billings* v. *Tucker*, 6 Gray, 368; *Harvey* v. *Epes*, 12 Gratt. 153); a trustee appointed under an order of the court, or by contract, deed, will or otherwise (*Thompson* v. *Ford*, 7 Ired. 418), or an assignee of the owner (*Final* v. *Backus*, 18 Mich. 218; *Southworth* v. *Sebring*, 2 Hill [S. C.], 587), or of a bankrupt or insolvent debtor (*McLeish* v. *Tylee*, 4 Strobh. [S. C.] 287); a mortgagee, after condition broken (*Robinson* v. *Kruse*, 29 Ark. 575), or a mortgagor in possession (*Parkhurst* v. *Jacobs*, 17 Mich. 302; *Middlesworth* v. *Robinson*, Wright [Ohio], 552); an executor or administrator (*Kirby* v. *Quinn*, 1 Rice [S. C.], 264; *Weiser* v. *Zeisinger*, 2 Yeates [Penn.], 537); an agent (*Burnett* v. *Roberts*, 4 Dev. [N. C.] 81); beneficiaries entitled to the possession of trust property (*Howard* v. *Snelling*, 28 Ga. 469); a mortgagee in possession (*Snyder* v. *Hitt*, 2 Dana, 204; *Colton* v. *Marsh*, 3 Wis. 221); a finder of property (*Bridges* v. *Hawkesworth*, 7 Eng. L. & Eq. 424; *Mathews* v. *Harsell*, 1 E. D. Smith [N. Y.], 393; *Clark* v. *Maloney*, 3 Harr. [Del.] 68; *McAvoy* v. *Medina*, 11 Allen, 548); a hirer of property (*Branch* v. *Morrison*, 6 Jones, 16); an officer who has attached property by taking it into his possession, actual or constructive (*Holt* v. *Burbank*, 47 N. H. 164; *Lockwood* v. *Bull*, 1 Cow. 322; *Brownell* v. *Manchester*, 1 Pick. 232); though it has been held that neither his keeper nor a receiptor can maintain it (*Ludden* v. *Leavitt*, 9 Mass. 104; *Com.* v. *Morse*, 14 id. 217); but as to a receiptor the rule is otherwise if he retains the possession of the property. *Waterman* v. *Robinson*, 5 Mass. 303; *Poole* v. *Symonds*, 1 N. H. 289.

A purchaser of property who has complied with the conditions of the purchase (*Chinery* v. *Viall*, 5 H. & N. 288), or to whom it has been delivered, or which at the time of sale was in the hands of a third person (*McGinn* v. *Worden*, 3 E. D. Smith, 355); the owner of a non-negotiable note (*Donnell* v. *Thompson*, 13 Ala. 440); an heir en-

titled to the property of a deceased parent when no administrator has been appointed (*Hyde* v. *Stone*, 7 Wend. 354); or a widow who has for several years been in possession of the estate of her deceased husband when adminstration has not been taken out upon it (*Brown* v. *Beason*, 24 Ala. 466); a bailee or consignee of goods (*Everett* v. *Saltus*, 15 Wend. 474; *Smith* v. *James*, 7 Cow. 328; *Thorp* v. *Burling*, 11 Johns. 285); whether with or without hire (*Faulkner* v. *Brown*, 13 Wend. 63); an assignee of a bond (*Clowes* v. *Hawley*, 12 Johns. 484); a receiver duly appointed by the court (*Wilson* v. *Allen*, 6 Barb. 542; *Gillet* v. *Fairchild*, 4 Denio, 80); by an administrator, for a conversion in the lifetime of his intestate (*Towle* v. *Lovet*, 6 Mass. 394; *Parrott* v. *Dubignon*, T. U. P. Charlt. 261; *Kirby* v. *Clark*, 1 Root, 389); by a donee (*Bourne* v. *Fosbrooke*, 18 C. B. [N. S.] 515; *Marsh* v. *Fuller*, 18 N. H. 360); and generally any person who is entitled to the *immediate possession* of property, against the person holding possession thereof. It is said in some of the cases, and laid down as a rule in some of the text-books, that a person must have a general or a special property in the property sought to be recovered for, but this can hardly be admitted. It is true that a general or a special owner may maintain the action when they are entitled to the possession of the property *instanter*, but it is also true that a person having no *property interest* therein may in certain cases maintain the action also. Mere naked possession, as against one holding no better title, is sufficient, if the property is wrongfully taken out of his possession (*Cook* v. *Patterson*, 35 Ala. 102; *Knapp* v. *Winchester*, 11 Vt. 351; *Carter* v. *Bennett*, 4 Fla. 283; *Coffin* v. *Anderson*, 4 Blackf. 395); and even a person who has acquired possession of goods by a trespass may maintain the action against one who takes them from his possession without a better right. *Knapp* v. *Winchester*, 11 Vt. 351; *Cook* v. *Patterson*, 35 Ala. 102. The question as to general or special property becomes important only where the goods were not wrongfully taken from the plaintiff's possession. Where the general owner has leased his property for a term, or for a specific purpose, he has parted with his right of possession for that period, and unless the lessee has forfeited his right to possession, the *owner* cannot maintain trover against a wrong-doer who takes them from the lessee, but the action must be in the name of the lessee, because *the right of possession* is in him (*Gordon* v. *Harper*, 7 T. R. 9, 13; *Billings* v. *Tucker*, 6 Gray, 368; *Bradley* v. *Copley*, 1 C. B. 698), and the lessee can maintain an action against the owner, if he wrongfully interferes with his possession of the property. *Hickok* v. *Buck*, 22 Vt. 149. Timber growing on land that has been leased to a tenant belongs to the landlord and he may maintain trespass against a

stranger who cuts it, because it is an injury to the reversion; but, for its *conversion*, the tenant must sue. *Berry* v. *Heard*, Cro. Car. 242. So it has been held that property given to a minor, as watches, books, etc., by a parent, and in the minor's possession, if wrongfully converted, must be sued for in the name of the minor. *Hunter* v. *Westbrook*, 2 C. & P. 578. Thus it will be seen that the real and decisive test as to who should, or can sue in trover, is the right to the possession of the property at the time when the action is brought, and that neither a general or a special owner can maintain the action unless they also show that they are entitled to the possession of the property. *Grady* v. *Newby*, 6 Blackf. 442; *Caldwell* v. *Cowan*, 9 Yerg. (Tenn.) 262; *Burton* v. *Tannehill*, 6 Blackf. 470; *Fairbank* v. *Phelps*, 22 Pick. 535; *Andrews* v. *Shaw*, 4 Dev. (N. C.) 70; *Gage* v. *Allison*, 1 Brev. (S. C.) 495. Where several persons are joint owners of a chattel, or have a joint right of possession, they must all be joined as plaintiffs for its conversion, but, if the defendant does not plead the non-joinder in abatement, one joint owner may recover to the extent of his interest. *Barnardiston* v. *Chapman*, cited 6 T. R. 770; *Addison* v. *Overend*, id. 770; *Dockwray* v. *Dickenson*, Skinner, 640.

§ 3. **Who cannot maintain the action.** From what has been stated in the preceding section it will be seen that no person can maintain an action of trover who is not, at the time when the action is brought, entitled to the possession of the property sought to be recovered for. Under this rule it has been held that an officer who attempts to attach property, but does not acquire either the actual or the constructive possession thereof, cannot maintain an action for its conversion (*Dubois* v. *Harcourt*, 20 Wend. 41); nor can a lessor who has temporarily parted with his possession of property for a time, or for a specific purpose, unless the term has expired, or the purpose has been consummated, or the lessee has forfeited his right thereto by a misuse of the property, or an abuse of his possession (*Gordon* v. *Harper*, 7 T. R. 9, 13; *Bradley* v. *Copley*, 1 C. B. 698); nor when the property is in the hands of a bailee who has a valid lien thereon for freight, repairs or other charges, nor does the action lie in favor of a mortgagee who has assigned the mortgage to a third person (*Horne* v. *Briggs*, 98 Mass. 510); nor can a person maintain the action in a representative capacity, as administrator when the right of possession exists in himself as an individual. *Hoover* v. *Wells*, 39 Miss. 445. It has been held in Missouri, that one trespasser or wrong-doer cannot maintain trover against another wrong-doer who takes the property out of his possession. *Turley* v. *Tucker*, 6 Mo. 583. But it is not believed that this doctrine is consistent with principle or authority, because, as previously stated, the

*gist* of the right to sue is not dependent upon the right of property in the thing converted, but the right of possession at the time of conversion, and a trespasser may hold property in his possession against any person who has not a better right, and a defendant can only justify upon the ground of a better title or right than the plaintiff had, and it has been held in Vermont, in *Knapp* v. *Winchester*, 11 Vt. 351; and in Connecticut, in *Haslem* v. *Lockwood*, 37 Conn. 500; 9 Am. Rep. 350; and in Alabama, in *Cook* v. *Patterson*, 35 Ala. 102, that mere naked possession, however acquired, is good as against a person having no right to the possession. Trover does not lie in favor of one joint tenant or tenant in common for a simple withholding of possession from a co-tenant. *Lucas* v. *Wasson*, 3 Dev. (N. C.) 398; *Cowan* v. *Buyers*, Cooke (Tenn.), 53; *Campbell* v. *Campbell*, 2 Murph. 65. For instances in which an action does lie in favor of one co-tenant, see § 4, Art. 2, *ante*, p. 186. A forwarder of goods who delivers them to a carrier under a contract with the owner to forward them, cannot maintain trover for their conversion. His title and right of possession are lost, when he delivers them to the carrier, who stands as the agent of the consignee. *Green* v. *Clarke*, 12 N. Y. (2 Kern.) 343. A person who has merely an equitable title to property cannot maintain trover therefor. Thus it has been held that the equitable owner of a bond, but to whom it had not been legally indorsed, had no such interest therein as would enable him to maintain an action for its conversion. *Killian* v. *Carrol*, 13 Ired. 431. An action does not lie in favor of a purchaser of goods against the seller, when they have not been delivered or paid for (*Bloxam* v. *Sanders*, 4 B. & C. 941; *Martindale* v. *Smith*, 1 Q. B. 389); nor even if they have been paid for, if they are intermingled with other goods of a similar kind, and have not been separated, so that the purchaser's right does not specifically attach to any particular goods (*Hill* v. *Robison*, 3 Jones, 501; *Austen* v. *Craven*, 4 Taunt. 644; *White* v. *Wilcks*, 5 id. 176); nor if the article was not *in esse* at the time of purchase and payment (*Mucklow* v. *Mangles*, 1 Taunt. 318; *Woods* v. *Russell*, 5 B. & Ald. 942); and in all cases, it may be said that no person except the legal owner, general or special, or a person who has the right to the immediate possession of the property, can maintain an action for the conversion of goods, and that neither a general or a special owner can sustain the action where the right of possession is in another, whether such right was acquired by contract or by operation of law. In all cases where the right of property is relied upon by the plaintiff, he must also establish a right of possession in himself of the particular property sought to be recovered for. *Mucklow* v. *Mangles*, 1 Taunt. 318; *Austen* v. *Craven*, 4 id. 644.

§ 4. **Who may be sued.** Every person who aids or assists in the conversion of property is liable for his acts, whether he acted for himself, or for another, or merely out of motives of friendship for one who had the property, or merely as the servant of a person who directed them to do the act (*Stephens* v. *Elwall*, 4 Maule & S. 261; *Perkins* v. *Smith*, 1 Wils. 328; *Greenway* v. *Fisher*, 1 C. & P. 190; *Nations* v. *Hawkins*, 11 Ala. 859); or even though he did the act by the direction of one whose commands he was bound to obey, as a soldier acting under the commands of a superior officer, and although the property was handed over to the officer giving the command and the soldier derived no benefit therefrom. *Yost* v. *Stout*, 4 Cold. (Tenn.) 205; *Ford* v. *Surget*, 18 Alb. L. J. 493. When property is converted by a wife, the husband and wife may both be sued, unless otherwise provided by statute. *Davis* v. *Taylor*, 41 Ill. 405; *Keyworth* v. *Hill*, 3 B. & Ald. 688. So where property is converted by a servant, while acting for his master within the scope of his duties, the master may be sued therefor (*Dench* v. *Walker*, 14 Mass. 500; *Jones* v. *Hart*, 2 Salk. 441); and it is of no consequence whether he had authority from the master to do the specific act or not. *Perkins* v. *Smith*, 1 Wils. 328; *Dench* v. *Walker*, 14 Mass. 500. When several have joined in a conversion of property an action will lie against one or all of them. The plaintiff may elect whether to sue one, two or all of the wrong-doers, and the non-joinder of the others cannot be plead in abatement. *Pattee* v. *Gilmore*, 18 N. H. 460. But two or more persons cannot be jointly charged in trover, unless there is a joint conversion, and a demand made upon one, and a refusal by him, does not establish a joint conversion. *White* v. *Demary*, 2 N. H. 546.

§ 5. **Defenses in general.** The only ground upon which a person can successfully defend against an action for the conversion of property is, by establishing his own right of possession thereto, either by contract or by operation of law (*Duncan* v. *Spear*, 11 Wend. 54; *Barwick* v. *Wood*, 3 Jones, 306), or by showing that the plaintiff is not entitled to the possession thereof (*Chouteau* v. *Hope*, 7 Mo. 428; *Philips* v. *Martiney*, 10 Gratt. 333), or that he has not converted the property (*Fouldes* v. *Willoughby*, 8 M. & W. 540; *Simmons* v. *Lillystone*, 8 Exch. 441), or that there has been a previous recovery against him for the same property (*Gates* v. *Goreham*, 5 Vt. 317; *Hopkinson* v. *Shelton*, 37 Ala. 306); or that the plaintiff has ratified the conversion. *Hewes* v. *Parkman*, 20 Pick. 90. The defendant may, of course, always show title, or right of possession in himself, and if he establishes either, it is a full defense. Thus, where a mortgagee of personal property brought trover against the defendant, it was held competent for him to show in defense that

he bought the property of the mortgagor, and that the mortgagee assented thereto. *Gage* v. *Whittier*, 17 N. H. 312. The fact that the plaintiff proposed to the defendants to acknowledge their title and hold it for them, unless it was accepted by both parties, and acted on, is no defense to an action for the conversion of the property (id.); nor, where the defendant wrongfully took the property in the first instance, can he defend, upon the ground that the property was subsequently taken out of his possession upon an execution in his favor against the plaintiff and sold thereon, and purchased by him at such sale. *Otis* v. *Jones*, 21 Wend. 394. But he may defend upon the ground that the statute of limitations has run against the conversion, and that, whether the plaintiff knew of the conversion or not (*Johnson* v. *White*, 21 Miss. 584; *Kelsey* v. *Griswold*, 6 Barb. 436; *Clarke* v. *Marriott*, 9 Gill [Md.], 331); or that he took the property upon a valid legal process against the plaintiff, the property being subject to attachment or levy (*Weinberg* v. *Conover*, 4 Wis. 803); but not if the process was invalid. *Allen* v. *Bridgers*, 52 Barb. 604; *Lyon* v. *Yates*, id. 237. So he may show that he was a lessee of the property for a time that had not expired when the action was brought (*Harvey* v. *Epes*, 12 Gratt. 153; *Hickok* v. *Buck*, 22 Vt. 149); or had a lien thereon that was unsatisfied, and this will be a defense unless, upon demand therefor, he claimed to hold the goods upon a different ground or had waived it. See *ante*, p. 201, § 17, Art. 2.

In trover for an alleged conversion of property, proof that the defendant sold it under a power of attorney from the plaintiff, rebuts the *prima facie* case made for the plaintiff by a demand and refusal. *Sturgis* v. *Keith*, 57 Ill. 451.

A subsequent ratification of a conversion, with full knowledge of all the facts, is a valid defense. *Fireman's Ins. Co.* v. *Cochran*, 27 Ala. 228. And the ratification may be either express or implied. Id.

§ 6. **Return of the property.** A defendant in trover may always show in defense as matter of mitigation that he returned or offered to return the property before suit brought (*Wells* v. *Kelsey*, 15 Abb. Pr. [N. Y.] 53; 38 Barb. 242. *Powers* v. *Bassford*, 19 How. [N. Y.] 309); or that he returned it after suit brought, and that it was accepted by the plaintiff, and while such return will not excuse his conversion of the property, yet it goes in mitigation of damages. *Yale* v. *Saunders*, 16 Vt. 243; *Gibbs* v. *Chase*, 10 Mass. 128; *Sparks* v. *Purdy*, 11 Mo. 219; *Wheelock* v. *Wheelwright*, 5 Mass. 104. The plaintiff, after suit brought, is not bound to receive the property back, but if he does do so, it goes in mitigation of the damages. *Yale* v. *Saunders*, 16 Vt. 243; *Smith* v. *Downing*, 6 Ind. 374.

§ 7. **Title in third person.** According to the weight of authority in this country, the defendant in trover cannot set up the title of a third person in defense, unless he in some manner connects himself therewith. *Duncan* v. *Spear*, 11 Wend. 54; *Weymouth* v. *Chicago, etc., R. R. Co.*, 17 Wis. 550; *Barwick* v. *Wood*, 3 Jones (N. C.), 306; *Harker* v. *Dement*, 9 Gill (Md.), 7; *Moore* v. *Aldrich*, 25 Tex. Supp. 276. But in some of the States it is held that proof of property in another is a good ground of defense. *Smoot* v. *Cook*, 3 W. Va. 172; *Glenn* v. *Garrison*, 17 N. J. Law, 1; *Rose* v. *Coble*, Phil. (N. C.) L. 517. But in any event it is competent for the defendant to show that the plaintiff has no right to the possession of the goods, if he establishes any right in himself. *Harrison* v. *Dixon*, 12 M. & W. 142; *Dorrington* v. *Carter*, 1 Exch. 566; *Owen* v. *Knight*, 4 Bing. N. C. 54.

§ 8. **Evidence.** In trover, the plaintiff, by proving a demand and refusal, is not precluded from introducing other evidence establishing, or tending to establish, a conversion in fact (*Clark* v. *Hale*, 34 Conn. 398); as that the defendant had sold the property (*Edwards* v. *Hooper*, 11 M. & W. 363; *Tomkins* v. *Haile*, 3 Wend. 406; *Kyle* v. *Gray*, 11 Ala. 233; *Fisk* v. *Ewen*, 46 N. H. 173); or that he had applied it to his own use (*Dudley* v. *Sawyer*, 41 N. H. 326); or any other matter that establishes an actual conversion, and, where the right of property is in the plaintiff, and the defendant holds the property after action commenced, very slight evidence will be sufficient to establish a conversion. *Fowler* v. *Stuart*, 1 McCord (S. C.), 504. To establish a conversion, proof of a wrongful taking is sufficient, provided the taking is shown to have been with the intent to deprive the owner of the benefit of his possession of the property, or a wrongful assumption of ownership, an illegal use or misuse of the property, or a wrongful detention. *Glaze* v. *McMillion*, 7 Port. (Ala.) 279. See Art. 2, *ante*, p. 163.

If the plaintiff relies upon his property in the goods converted, the burden is upon him to show property in himself, and a right of possession under his title, and if he depends upon a possessory right, he must establish it by proof. *Yoner* v. *Neidig*, 1 Yeat. (Penn.) 19; *Picquet* v. *McKay*, 2 Blackf. 465; *Sheldon* v. *Soper*, 14 Johns. 352; *Stone* v. *Waggoner*, 8 Ark. 204; *Vanderburgh* v. *Bassett*, 4 Minn. 242. He is also bound to prove that the property sued for has some value, and what that value is (*Miller* v. *Reigne*, 2 Hill [S. C.], 592); also, that the defendant took or detained the property without right, but he need not show that he had it in his possession when the action was brought, but he must show that he had it before (*Zachary* v. *Pace*, 9 Ark. 212); and if the defendant purchased it of one who was the apparent owner, but was not so in fact, it must be shown that he assumed dominion over

the property after the lawful owner was made known to him. *Parker* v. *Middlebrook*, 24 Conn. 207. If the defendant has color of title, the plaintiff must show title as well as possession. *Fightmaster* v. *Beasly*, 7 J. J. Marsh. (Ky.) 410. If the plaintiff's title was derived under an execution sale, and the action is against one who has sold the same property upon an execution against the same debtor, the plaintiff, in order to make out a right of recovery, must prove the judgment and execution under which he purchased. *Yates* v. *St. John*, 12 Wend. 74. In order to recover for property alleged to have been stolen from the plaintiff, he is not bound to prove the guilt of the defendant beyond a reasonable doubt, but the question of his right to recover is to be determined by the weight of evidence, as in other cases. *Sinclair* v. *Jackson*, 47 Me. 102. In trover the plaintiff must prove property in himself, and a right to the possession at the time of the conversion by the defendant, and the value of the property. *Danley* v. *Rector*, 10 Ark. 211.

§ 9. **Damages.** In trover, the general rule is that the damages should embrace the value of the property at the time of conversion, with the interest up to the time of judgment (*Shepard* v. *Pratt*, 16 Kan. 209; *Burney* v. *Pledger*, 3 Rich. [S. C.] 191; *Curtis* v. *Ward*, 20 Conn. 204; *Ryburn* v. *Pryor*, 14 Ark. 505; *Funk* v. *Dillon*, 21 Mo. 294; *Nesbitt* v. *St. Paul Lumber Co.*, 21 Minn. 491; *Finch* v. *Blount*, 7 C. & P. 478; *Mercer* v. *Jones*, 3 Camp. 477; *Ainsworth* v. *Bowen*, 9 Wis. 348; *Hurd* v. *Hubbell*, 26 Conn. 389; *Brown* v. *Haynes*, 52 Me. 578; *Backenstoss* v. *Stahler*, 33 Penn. St. 251; *Moore* v. *Aldrich*, 25 Tex. Supp. 276; *Park* v. *McDaniels*, 37 Vt. 594; *Ripley* v. *Davis*, 15 Mich. 75; *Johnson* v. *Sumner*, 1 Metc. (Mass.) 172; *Selkirk* v. *Cobb*, 13 Gray, 313; *Connor* v. *Hillier*, 11 Rich. L. 193); but the jury may give their value at a subsequent time as damages. *Greening* v. *Wilkinson*, 1 C. & P. 625; *Tatum* v. *Manning*, 9 Ala. 144; *Jenkins* v. *McConico*, 26 id. 213; *Guerry* v. *Kerton*, 2 Rich. (S. C.) 507. But, if the plaintiff only has a life estate, or other limited interest in the property, the damages should only cover the value of that interest. *Strong* v. *Strong*, 6 Ala. 345. If the property has depreciated in value between the time of conversion and of trial, its value at the time of conversion should be given. *Mott* v. *Pettit*, 1 N. J. Law, 298. In an action to recover a bond or other security, the damages should be for such sum as can be recovered upon them (*Romig* v. *Romig*, 2 Rawle, 241); and if property of any kind is sold and converted into money, the least sum that can be given as damages is the sum received, and this may be increased if the evidence shows that its real value was greater than the sum for which it was sold. *Ewart* v. *Kerr*, 2 McMull. (S. C.) 141. In an action against

a receiptor by the sheriff, the plaintiff cannot recover more than the amount for which it was receipted, even if its value exceeds that sum, nor more than its *real* value if the receipt is for more. *Burk* v. *Webb*, 32 Mich. 173. In trover for a draft, check, note, bill of exchange, etc., *prima facie* the measure of damages is the face value, and it may be shown that its actual collectible value is much less, and in such case its actual collectible value is the true measure of recovery (*Cothran* v. *Hanover Nat. Bank*, 8 Jones & Sp. [N. Y.] 401); but in *Stephenson* v. *Thayer*, 63 Me. 143, it was held that the pecuniary ability of the payor of a note cannot be considered in estimating the damages for the conversion of a note. When the tort is waived, and assumpsit is brought, the recovery is limited to the amount actually received by the defendant. *Howell* v. *Graves*, 27 Ark. 365. When property has been sold, the sum received therefor is *prima facie* evidence of its value, but the plaintiff may show that its real value was more, but the defendant will be estopped from claiming that its real value was less. *Dalton* v. *Laudahn*, 27 Mich. 529; *Sun Mut. Ins. Co.* v. *Talmadge*, 4 Daly (N. Y.), 540. Special damages can be recovered, if declared for and established, but not otherwise. Thus, the plaintiff having hired his horse to another, the defendant took it wrongfully from the bailee's possession, and used it, and in consequence, the plaintiff, supposing that the defendant had absconded, went in pursuit of his property. The court held that, if he declared for them, these were proper items of damage (*Bennett* v. *Lockwood*, 20 Wend. 223; *Miller* v. *Garling*, 12 How. [N. Y.] 203); but the expenses of an unsuccessful lawsuit are not recoverable as special damages. *Wilson* v. *Mathews*, 24 Barb. 295. In an action by a bailee or special property man against the general owner, the damages are limited to the value of his special property, but, in an action against a stranger, he is entitled to recover the value of the property converted, and holds the balance beyond his own interest for the benefit of the general owner (*Alt* v. *Weidenberg*, 6 Bosw. [N. Y.] 176; *Schley* v. *Lyon*, 6 Ga. 530; *Ullman* v. *Barnard*, 7 Gray, 554); and such is the rule in all cases where the plaintiff is liable over to a third party, and the same is true in all cases where the defendant is not entitled to the balance of the value. *Chamberlin* v. *Shaw*, 18 Pick. 278. In an action to recover for a bank bill, *prima facie* its face value is the measure, but the defendant may show its real value to be less, and its actual value only is recoverable (*Murray* v. *Pate*, 6 Dana, 335); and if it is to recover for gold coin, the value of gold in currency should be assessed. *Taylor* v. *Ketchum*, 5 Robt. (N. Y.) 507. In trover for coal mined and wrongfully carried away, the measure of damages is the value of the coal in place, and such injury to the land in mining as may have been

caused thereby (*Forsyth* v. *Wells*, 41 Penn. St. 291); and where the defendant in excavating for a canal which was really beneficial to the owners, but applied the clay taken out to his own use, in the manufacture of brick, it was held that in trover therefor, the measure of damages was not what the clay was worth, over and above the value to the owner, or the labor of excavating it, but what it was worth to the defendants who appropriated it to their own gain and advantage. *Chicago, etc., Dock Co.* v. *Dunlap*, 32 Ill. 207. If goods are delivered to a person at one place, to be forwarded to another, and he does not forward, but converts them to his own use, the value at the place at which they were to be delivered is the measure of recovery. *Farwell* v. *Price*, 30 Mo. 587; *Briggs* v. *Boston, etc., R. R. Co.*, 6 Allen, 246. If property converted has been sold, and the proceeds applied in payment of the plaintiff's debts, or otherwise to his use, such facts go in mitigation. *Pierce* v. *Benjamin*, 14 Pick. 356. Thus, in the case last cited, the defendant, as collector of taxes, seized property exempt from seizure, and sold it under his tax warrant, and liquidated the tax, and the court held that the measure of recovery was the value of the property, less the tax paid. See, to same effect, *Prescott* v. *Wright*, 6 Mass. 20; *Caldwell* v. *Eaton*, 5 id. 399. Where property is sold upon condition that it shall remain the property of the vendor until paid for, and payments were made thereon before conversion, the measure of recovery is not the value of the property, less the amount paid thereon, but the actual value of the property when converted, without any deductions for payments. *Duncan* v. *Stone*, 45 Vt. 118; *Angier* v. *Taunton Paper Mf. Co.*, 1 Gray, 621. When the property has been restored by the defendant, before the trial, and received by the plaintiff, such restoration goes in mitigation, and the recovery is limited to the actual damage sustained by the plaintiff, in view of such restoration. *Greenfield Bank* v. *Leavitt*, 17 Pick. 1.

§ 10. **Judgment and its effect.** A judgment in an action of trover does not vest the property in the chattel, unless it is followed by satisfaction (*Brinsmead* v. *Harrison*, L. R., 6 C. P. 584; *Osterhout* v. *Roberts*, 8 Cow. 43; *Morris* v. *Berkley*, 2 Treadw. [S. C.] 228; *Spivey* v. *Morris*, 18 Ala. 254; *Hepburn* v. *Sewell*, 5 H. & J. [Md.] 211; *Smith* v. *Alexander*, 4 Sneed [Tenn.], 482; *Lovejoy* v. *Murray*, 3 Wall. 1, 16), nor unless it is for the *value* of the property. If the damages are merely nominal, it is treated as covering only the damages for detention. *Barb* v. *Fish*, 8 Blackf. 481. A judgment and satisfaction is treated as equivalent to a purchase of the goods by the defendant, at the value assessed by the jury (*Brinsmead* v. *Harrison*, L. R., 6 C. P. 584), and it is upon this principle that a verdict, not

estimated on the footing of the full value, does not vest the property in the defendant. *Holmes* v. *Wilson*, 10 Ad. & El. 511, *n*. In some of the States where a judgment is rendered for the plaintiff for the full value of the property, it is held to vest the property in the goods in the defendant. Thus, in a recent case in Michigan, it was held that a recovery in trover puts an end to any rights of the plaintiff therein to reclaim the property, and leaves the title in those at whose instance or for whose benefit the conversion was brought about. *Kenyon* v. *Woodruff*, 33 Mich. 310. In South Carolina in several cases, it has been held that a judgment for the plaintiff transfers the title to the property converted, to the defendant, so that it may be sold upon an execution against him (*Foreman* v. *Neilson*, 2 Rich. Eq. 287; *Rogers* v. *Moore*, 1 Rice, 60; *Chantrau* v. *Smith*, 1 Rice, 229), and in Tennessee it is held that when judgment is rendered for the value of property converted, it is a bar to any subsequent action for the same property. *Rembert* v. *Hally*, 10 Humph. 513. Formerly, in England, a judgment for the plaintiff was held to transfer the title in the property to the defendant (*Adams* v. *Broughton*, 2 Stra. 1078; *Cooper* v. *Shepherd*, 3 C. B. 266), but it is now held not to have that effect until the judgment is satisfied, and such seems to be the most sensible rule (*Lovejoy* v. *Murray*, 3 Wall. 1, 16; *Brinsmead* v. *Harrison*, L. R., 7 C. P. 584), and this latter case overrules the *dictum* of Jervis, C. J., in *Buckland* v. *Johnson*, 15 C. B. 145, that, by the mere recovery, the property is vested in the defendant, by relation, from the time of the conversion.

# CHAPTER CXXIX.

## USE AND OCCUPATION.

### ARTICLE I.

#### OF USE AND OCCUPATION IN GENERAL.

**Section 1. Definition and nature.** The action for use and occupation is founded on privity of contract, not on privity of estate. *Henwood* v. *Cheeseman*, 3 Serg. & R. 500; *Hayes* v. *Acre*, Cam. & N. (N. C.) 19. The plaintiff must prove a contract, but the proof may be either direct or presumptive. *Moore* v. *Harvey*, 50 Vt. 297, 300. If he prove that the defendant occupied the land by his permission, it is enough, and the law will in such case imply that the defendant promised to pay a reasonable rent. *Kiersted* v. *Orange, etc., R. R. Co.*, 1 Hun, 151; 3 N. Y. (T. & C.) 662; *Sutton* v. *Mandeville*, 1 Munf. (Va.) 407; *Logan* v. *Lewis*, 7 J. J. Marsh. 6; *Shattuck* v. *Ransom*, 2 Aik. (Vt.) 252; *La Farge* v. *Park*, 1 Edm. (N. Y.) Sel. Cas. 223; *Rogers* v. *Libbey*, 35 Me. 200. It can only be maintained upon a contract, express or implied. *Stewart* v. *Fitch*, 2 Vroom (N. J.), 17; *Hall* v. *Southmayd*, 15 Barb. 32; 1 Wait's Law & Pr. 717.

And it will lie as well upon an implied as upon an express contract. *Osgood* v. *Dewey*, 13 Johns. 240; *Gunn* v. *Scovil*, 4 Day (Conn.), 228; *Stockett* v. *Watkins*, 2 Gill & Johns. (Md.) 326; *Crouch* v. *Briles*, 7 J. J. Marsh. 257; *Estep* v. *Estep*, 23 Ind. 114. And the defendant who goes in under implied permission is not to be permitted to dispute the title. *Pierce* v. *Pierce*, 25 Barb. 243; *Sampson* v. *Schaffer*, 3 Cal. 196. The law will imply a contract to pay rent from the mere fact of occupation, unless the character of the occupancy be such as to negative the existence of a tenancy. *Chambers* v. *Ross*, 1 Dutch. (N. J.) 293; *Phelps* v. *Conant*, 30 Vt. (1 Shaw) 277. When the tenant disclaims the tenancy, no such implication can arise. *Jackson* v. *Mowry*, 30 Ga. 143. But, a tenancy cannot be implied, from the circumstance of a vendor remaining in possession of premises after a sale, so as to enable the vendee to maintain an action for use and occupation. *Greenup* v. *Vernor*, 16 Ill. 26.

Although an action for use and occupation requires some agreement,

express or implied, to pay for the occupation ; yet, there may be a liability for the use and occupation, where no action for rent could be maintained. *Smith* v. *Eldridge*, 15 C. B. 236; 26 Eng. Law & Eq. 285. The consent of the owner of the premises to their use is necessary to establish the relation of landlord and tenant; and where the owner objects to the use of the premises, he cannot maintain an action for rent. *Baxter* v. *West*, 5 Daly, 460.

A suit for use and occupation of real estate can only be sustained where the relation of landlord and tenant exists expressly or by implication. *Nance* v. *Alexander*, 49 Ind. 516; *Dalton* v. *Laudahn*, 30 Mich. 349; *Edmonson* v. *Kite*, 43 Mo. 176; *Sylvester* v. *Ralston*, 31 Barb. 286; *Newby* v. *Vestal*, 6 Ind. 412. Where such relation does not exist, the possession is hostile, and the owner's remedy is by ejectment and for damages. *Espy* v. *Fenton*, 5 Oreg. 423; *Lankford* v. *Green*, 52 Ala. 103. So in case of an adverse possession, where the relation of landlord and tenant has never arisen, assumpsit for use and occupation will not lie, but the declaration must be either in ejectment or trespass. *Folsom* v. *Carli*, 6 Minn. 420. And where one acquires possession of land under a contract of sale, and afterward refuses to perform the contract, the vendor must resort to ejectment to recover possession and mesne profits. *McNair* v. *Schwartz*, 16 Ill. 24; *Smith* v. *Stewart*, 6 Johns. 46; *Thompson* v. *Bower*, 60 Barb. 477; *post*, p. 229, § 3.

The action for mesne profits subsequent to ejectment is, in New York, trespass in the nature of use and occupation. *Campbell* v. *Renwick*, 2 Bradf. (N. Y.) 80.

In an action for use and occupation, a direction that a constructive occupation by the defendant is sufficient to sustain the action is error unless what is constructive occupation is explained. *Towne* v. *D'Heinrich*, 13 C. B. 892; 24 Eng. Law & Eq. 235. Acceptance of the key of a house is sufficient to establish occupation, which will be presumed to be continued in accordance with the letting until the contrary appears. *Seaman* v. *Ward*, 1 Hilt. (N. Y.) 52.

The action for use and occupation does not necessarily presuppose any demise. *Chambers* v. *Ross*, 1 Dutch. (N. J.) 293. The contract will be enforced upon proof of title in the plaintiff and occupation by the defendant. *Clark* v. *Green*, 35 Ga. 92. It is not necessary to prove that the defendant has been in actual manual occupation of the premises during the whole time for which recovery is sought. Legal possession under the power given by the landlord to occupy and enjoy is sufficient. *Hall* v. *Western Transportation Co.*, 34 N. Y. (7 Tiff.) 284; *Pinero* v. *Judson*, 3 M. & P. 497; S. C., 6 Bing. 206.

§ 2. **When the action lies.** To sustain an action for use and occupation the defendant must have actually taken possession of the premises, either by himself, his agent or his under-tenant. *Beach* v. *Gray*, 2 Denio, 84; *Waring* v. *King*, 8 M. & W. 571; *Bordman* v. *Osborn*, 23 Pick. 295; *Tully* v. *Dunn*, 42 Ala. 262. But see *ante*, p. 226, § 1. A mere permissive holding, or a holding under an agreement for a lease, or a void lease, or a contract for a sale which has gone off, is sufficient to sustain the action. *Codman* v. *Jenkins*, 14 Mass. 93; *Blume* v. *McClurken*, 10 Watts, 380; *Warner* v. *Hale*, 65 Ill. 395; *Dawes* v. *Dowling*, 22 W. R. 770; 31 L. T. (N. S.) Exch. 65; *Howard* v. *Shaw*, 8 M. & W. 118; *Little* v. *Pearson*, 7 Pick. 301; *Edge* v. *Strafford*, 1 C. & J. 391. It lies where the holding is on an implied, as well as where it is on an express permission of the landlord. *Osgood* v. *Dewey*, 13 Johns. 240. It lies at common law independently of statute, on an express promise to pay a certain sum, or in general terms to pay to the landlord's satisfaction, where the occupancy is by his permission. *Eppes* v. *Cole*, 4 H. & M. (Va.) 161; *Burnham* v. *Best*, 10 B. Monr. 227.

The action lies, where a party, renting lands on condition of making certain repairs, fails to perform the condition (*Tate* v. *McClure*, 25 Ark. 168); where the defendant, under a verbal agreement to purchase certain real estate of the plaintiff, went into possession thereof and failed to pay at the time stipulated and afterward voluntarily abandoned the premises (*Patterson* v. *Stoddard*, 47 Me. 355); where there is a void agreement for use and occupation, if the land is subsequently entered upon and occupied (*Stebbins* v. *Peck*, 8 Gray, 553); against a tenant at will, after he has left the premises without giving due notice of an intention to terminate his tenancy, although he afterward derives no benefit therefrom (*Walker* v. *Furbush*, 11 Cush. 366); against one who takes possession of vacant land, admitting that he has no title and expressing a willingness to pay rent to the rightful owner. *Smith* v. *Houston*, 16 Ala. 111. The action lies for the use of incorporeal as well as corporeal hereditaments, as for tolls, stallage, a fishery or a water-course. *Bird* v. *Higginson*, 4 N. & M. 505; S. C., 2 A. & E. 696.

Where certain contractors built a dry-dock which was to be at their own risk, till tested and accepted by the government, and during the construction the contractors docked government vessels free of charge, and other vessels at reasonable rates, it was held that this was a use of the dock for the mutual benefit and by the joint consent of both parties. *Gilbert's Case*, 4 Ct. of Cl. 290.

In an action for use and occupation, after the death of the lessor,

bought by the receiver of his estate, where the complaint alleges the original lease, the holding over by the tenant "on the same terms and conditions" and the appointment of the reciever, it is a sufficient averment of the relation of landlord and tenant, and of an implied agreement to pay the rent reserved in the lease, and no averment is necessary as to who holds the fee. *Hunt* v. *Wolfe*, 2 Daly (N. Y.), 298.

In Iowa, an action to recover for the use and occupation of real estate must be brought within five years from the time when the cause of action accrued. And a tenancy will not be presumed, for the purpose of preventing the operation of the statute of limitations, to continue after the landlord has been adjudged not to be the owner of the leased property, notwithstanding the lease may not have expired. *Tibbetts* v. *Morris*, 42 Iowa, 120.

When a contract of sale fixes the day of completion, and provides that after that day, if the purchase is not completed, the vendor shall receive interest on the purchase-money, and the purchaser the rents and profits, an action for an occupation rent will lie against the vendor if the premises are in his occupation. *Metropolitan Railway Co.* v. *Defries*, L. R., 2 Q. B. Div. 138.

§ 3. **When the action does not lie.** When land is occupied by a person, not the owner, in such manner and under such circumstances that a contract to pay rent cannot, in law, be implied, rent for such occupancy cannot be recovered in the absence of an express contract to pay it. *Mitchell* v. *Pendleton*, 21 Ohio St. 664; *Dennett* v. *Penobscot Fair Ground Co.*, 57 Me. 425; 2 Am. Rep. 58; *Watson* v. *Brainard*, 33 Vt. (4 Shaw) 88; *Curtis* v. *Treat*, 21 Me. 525. To maintain an action for use and occupation, the relation of landlord and tenant *ex contractu* must exist, either by express or implied agreement. *Moore* v. *Harvey*, 50 Vt. 297, 300. An action for use and occupation will not lie against one who enters upon land of the plaintiff, under an agreement of purchase which he fails to carry out (*Smith* v. *Stewart*, 6 Johns. 46; *Thompson* v. *Bower*, 60 Barb. 463, 477; *Stacy* v. *Vermont, etc., R. R. Co.*, 32 Vt. 551; *Miles* v. *Elkin*, 10 Ind. 329; *Brewer* v. *Craig*, 3 Harr. [N. J.] 214); nor against an actual trespasser. *Hurd* v. *Miller*, 2 Hilt. (N. Y.) 540; *Smith* v. *Houston*, 16 Ala. 111. And when the defendant is a disseisor, and is treated as such by the plaintiff, *assumpsit* for use and occupation will not lie. *Howe* v. *Russell*, 41 Me. 446; *Sampson* v. *Schaeffer*, 3 Cal. 196. It will not lie where the defendant claims title adversely to the plaintiff (*Williams* v. *Hollis*, 19 Ga. 313; *Cincinnati* v. *Walls*, 1 Ohio St. 222; *De-Young* v. *Buchanan*, 10 Gill & Johns. [Md.] 149); nor in any case where the defenant's possession was tortious. *Ryan* v. *Marsh*, 2 Nott

& McC. 156; *Henwood* v. *Cheeseman*, 3 Serg. & Rawle, 500; *Wiggin* v. *Wiggin*, 6 N. H. 298. But when the holding of possession of the premises is by permission of the owner, an undertaking on the part of the tenant to pay rent may be implied from slight circumstances. *Watson* v. *Brainard*, 33 Vt. 88.

The action will not lie for mesne profits accruing after the date of a demise in the declaration in ejectment (*Sinnard* v. *McBride*, 3 Ham. [Ohio] 264; *Poindexter* v. *Cherry*, 4 Yerg. [Tenn.] 305); nor for the use and occupation by the defendant of premises sold at an execution, or a trust sale, from the time of the sale till the redemption of the estate, except on contract between the parties for rent. *Odonnell* v. *McMurdie*, 6 Humph. 134.

It will not lie during the existence of a lease of the same premises, unless it be shown that the person in possession is in under some new and distinct agreement of hiring and letting between the landlord and him (*Glover* v. *Wilson*, 2 Barb. 264); nor can it be maintained where the relation of landlord and tenant never existed. *Richmond, etc., Road Co.* v. *Rogers*, 7 Bush (Ky.), 532. And the use of an unimproved bank of a river, in mooring rafts, will not create the relation of landlord and tenant between the riparian owner and the proprietor of the rafts. *Hall* v. *Jacobs*, 7 Bush (Ky.), 595.

The action for use and occupation cannot be maintained where there is a lease under seal, either against the lessee or his assignee; the action must be upon the demise to recover the rent reserved. *Wood* v. *Wilcox*, 1 Denio, 37; *Kiersted* v. *Orange, etc., R. R. Co.*, 69 N. Y. (24 Sick.) 343; *Blume* v. *McClurken*, 10 Watts, 380. Where the defendant takes possession of lands under an agreement to exchange lands with the plaintiff, who represents his land to be free from incumbrances when they are not, and the defendant is evicted under proceedings to foreclose the incumbrance, no action lies for use and occupation against the defendant in favor of such plaintiff. *Garvin* v. *Jennerson*, 20 Kans. 371.

§ 4. **Who may maintain the action.** The action may be brought by the lessor while holding the reversion, and he can maintain it even after assigning the reversion, if he reserved the rent due; and his assignee of the reversion can sue for an occupation after notice of his right, and an heir of the lessor can sue a tenant holding over. *Birch* v *Wright*, 1 Term R. 378; *Hunt* v. *Wolf*, 2 Daly (N. Y.), 298. An infant may maintain the action in his own name though he has a guardian. *Porter* v. *Bleiler*, 17 Barb. 149. A township in Ohio may maintain the action against an occupant under a void lease. *Wilson* v. *The Trustees*, 8 Ohio, 174. Although the plaintiff in an action for

rent claims upon an alleged lease, which he fails to establish, yet, if his evidence proves use and occupation, he may recover the value. *Silverstein* v. *Stern*, 21 La. Ann. 743.

The peaceable entry and the occupation of the house or lands of another, acquiesced in without any agreement, written or verbal, as to rent, will authorize the owner to bring an action for use and occupation. *Dell* v. *Gardner*, 25 Ark. 134.

When real estate is devised to a person, he may maintain an action in his individual name for the use and occupation thereof, although he holds the property as trustee. *Chapin* v. *Foss*, 75 Ill. 280.

§ 5. **Who cannot maintain the action.** A tenant in common cannot recover in *assumpsit* against his fellow tenant for the use and occupation of the common property, without an express contract to pay rent. *Kline* v. *Jacobs*, 68 Penn. St. 57; *Dresser* v. *Dresser*, 40 Barb. 300. And if one tenant in common claim to recover for use and occupation of one who sustains the relation of tenancy to him, only by virtue of a demise of the whole premises from another tenant in common, the plaintiff thereby ratifies the demise; and if the rent has been paid to the tenant in common, making the demise in accordance with its terms, the plaintiff cannot recover. *Phelps* v. *Comant*, 30 Vt. 277. The action will not lie in favor of a stranger for the purpose of trying his title to land, nor by one of two litigating parties, claiming land. The action does not depend on the validity of the plaintiff's title, but on a contract, express or implied, between the parties. *Codman* v. *Jenkins*, 14 Mass. 95; *Boston* v. *Binney*, 11 Pick. 1. Hence it will not lie for an heir who has evicted the defendant (*Codman* v. *Jenkins*, 14 Mass. 95); nor in favor of a devisee after recovering judgment in a writ of formedon, against the lessee of the tenant in possession, who held the devisee out. *Fletcher* v. *McFarlane*, 12 Mass. 46.

The heirs at law of the owner of a tenement who, in his life-time, had let it to his illegitimate son, cannot sustain an action for use and occupation thereof after the father's death, when such use and occupation have been continued by the son under a claim of right, and in the belief that he was legitimate. *Flood* v. *Flood*, 1 Allen, 217. And a widow cannot recover of the heir or devisee for the use, etc., of the land of her husband, merely because she is entitled to dower which has not been assigned to her. *Andrews* v. *Andrews*, 2 Green (N. J.), 141; *Waters* v. *Williams*, 38 Ala. 680.

A plaintiff who has recovered judgment in a writ of entry against the defendant as a disseizor cannot subsequently maintain an action of assumpsit against him for use and occupation, in the absence of any proof of an express promise. *Goddard* v. *Hall*, 55 Me. 579.

An action of contract for the use of a railroad cannot be maintained by the owner against persons who did not recognize his title, but used the railroad adversely to him, under a *bona fide* claim of right, by virtue of a lease from another person. *Kittredge* v. *Peaslee*, 3 Allen, 235.

Coparceners cannot separately maintain an action for money had and received, against a person who had received the rent of their land as trustee, nor recover in separate actions, upon an implied demise upon a count for use and occupation. *Hoffar* v. *Dement*, 5 Gill (Md.), 132.

§ 6. **Against whom the action lies.** The action will lie against the lessee or his assignee of the term, against his trustees in an assignment for the benefit of creditors, though not in occupation of the premises; or against his assignees in bankruptcy, or his personal representatives, actually occupying them; against a tenant holding over for the use after the expiration of his term; or against a tenant who quits possession without a regular determination of his lease, and without acceptance of another tenant by the landlord. *Harding* v. *Crethorn*, 1 Esp. 57; *Boston, etc., R. R. Co.* v. *Ripley*, 13 Allen, 421; *Graham* v. *Whichelo*, 1 C. & M. 188; *Walls* v. *Atcheson*, 3 Bing. 462; *VanBrunt* v. *Pope*, 6 Abb. (N. Y., N. S.) 217; *Abel* v. *Radcliff*, 13 Johns. 297.

Assumpsit for use and occupation will lie against one who takes possession of vacant land, admitting that he has no title, and expressing a willingness to pay rent to the rightful owner; but possession by a naked trespasser is not of itself sufficient to maintain the action. *Smith* v. *Houston*, 16 Ala. 111. But it will lie against a naked trespasser on real estate in favor of a lessee who elects to waive the trespass and permits the trespasser to retain possession until the expiration of his term. *Catterlin* v. *Spinks*, 16 Ala. 467.

Where a corporation have actually used and occupied land for the purpose of their incorporation, by the permission of the owner, it seems that they are liable to be sued in assumpsit for use and occupation, notwithstanding they have not entered into a contract under their common seal. *Lowe* v. *The London & North-Western Railway Co.*, 18 Q. B. 632; 14 Eng. Law & Eq. 18.

An action for use and occupation is maintainable against a purchaser under a contract, stipulating that he shall hold the premises from its date as tenant, at sufferance of the vendor, subject to be removed as tenant holding over whenever default shall be made in the payment of any installment of the purchase-money; also that he shall pay the

taxes and keep the buildings, etc., in repair. *Wright* v. *Roberts*, 22 Wis. 161.

In an action for use and occupation against one who, previous to the period claimed for, was the plaintiff's tenant of the premises, the burden is on the defendant to prove the discontinuance of the relation. *Hill* v. *Goolsby*, 41 Ga. 289.

§ 7. **Against whom the action does not lie.** Assumpsit for use and occupation does not lie against a mere naked trespasser (*Weaver* v. *Jones*, 24 Ala. 420) nor against under-tenants (*Bedford* v. *Terhune*, 30 N. Y. [3 Tiff.] 453), nor where there is a lease of the premises to other parties and the defendants are in as assignees of that term (Id.), nor against a person who entered into possession as a purchaser, though the contract of purchase was rescinded, and the premises recovered back in ejectment. *Mariner* v. *Burton*, 4 Harring. (Del.) 69; *Kirtland* v. *Pounsett*, 2 Taunt. 145.

Where one enters upon premises as tenant of a disseizor, and afterward promises by parol to pay the rent to the true owner, he is not liable to an action by such owner for use and occupation, unless entry is first made by the disseizee to purge the disseizin. *Roxbury* v. *Huston*, 39 Me. 312.

If one enter on land under a contract for a deed, the relation of landlord and tenant does not exist, and on his refusing to perform the contract, or on the owner's neglecting to execute a deed, he is not liable in assumpsit for use and occupation. *Smith* v. *Stewart*, 6 Johns. 46; *Vanderheuvel* v. *Storrs*, 3 Conn. 203; *Bell* v. *Ellis*, 1 Stew. & Port. 294; *Little* v. *Pearson*, 7 Pick. 301; *Jones* v. *Tipton*, 2 Dana, 295. But see *Clough* v. *Hosford*, 6 N. H. 234. *Ante*, p. 229 Nor is a third person so liable, who has come into possession under the plaintiff as a purchaser from him (*Bancroft* v. *Wardwell*, 13 Johns. 489), nor a *bona fide* purchaser from the heirs of a disseisor, after a descent cast, and without notice of the disseizin. *Wharton* v. *Fitzgerald*, 3 Dall. 503.

An action of assumpsit for use and occupation of land cannot be maintained by one of several heirs of the person who died seized thereof, against a person who entered and used the same under a contract of purchase from a stranger, who sold the land without right. *Hoffar* v. *Dement*, 5 Gill (Md.), 132.

Where one of two lessees occupied the demised premises during the lease, and continued to occupy them after its expiration, and the other lessee boarded with him throughout his occupation, and after the lessor's estate had been terminated by a conveyance to a stranger, it was held, in an action brought by the grantee against both lessees for use

and occupation since such conveyance, that the boarder was not liable. *Theological Inst. of Conn.* v. *Barbour*, 4 Gray, 329. A party who enters upon the premises of another under an agreement to purchase, which is afterward consummated by a valid conveyance in fee, is not liable for use and occupation prior to the delivery and acceptance of the deed and the payment and receipt of the purchase-money. To sustain an action for rent, the relation of landlord and tenant must subsist; but the express contract of sale negatives an implied contract of lease. *Carpenter* v. *United States*, 6 Ct. of Cl. 157. *Ante*, p. 229.

The owner of land cannot recover rent against one who enters upon it under an express promise to pay rent to another, for an implied promise to one cannot be raised in the face of an express promise to another for the same consideration. *Shumake* v. *Nelms*, 25 Ala. 26.

§ 8. **Amount of recovery.** In an action for the use and occupation of a lot of ground, the plaintiff cannot recover, without proof of a contract, express or implied, to pay either a stipulated compensation, or such a sum as the use is reasonably worth; nor for occupation prior to the time when the contract was made, or to an acknowledgment by the defendant of his relation as tenant. *Brolasky* v. *Ferguson*, 48 Penn. St. 434. By making such proof, the plaintiff is entitled to recover the worth of the use while the defendant occupied, not a *pro tanto* part of the yearly value. *Hanes* v. *Worthington*, 14 Ind. 320. A consent by the landlord to the termination of a tenancy between the stated times, fixed for the payment of rent, will prevent his recovering for the time occupied subsequent to the last of such periods. *Hall* v. *Burgess*, 5 B. & C. 332. He cannot recover for the use of any part of the premises, after he has evicted the tenant from a part thereof, while such eviction continues (*Lawrence* v. *French*, 25 Wend. 443); nor for use subsequent to the demise laid in an ejectment by which he has recovered possession (*Birch* v. *Wright*, 1 Term R. 378); nor for use after the commencement of proceedings for re-entry against a tenant holding over. *Powers* v. *Witty*, 42 How. (N. Y.) 352; S. C., 4 Daly, 552; *Featherstonhaugh* v. *Bradshaw*, 1 Wend. 134.

In this action it is competent for the plaintiff to show what the same property rented for in years immediately preceding, as well as what like property in the same neighborhood rented for at the same time. *Fogg* v. *Hill*, 21 Me. 529. And see *McCarty* v. *Ely*, 4 E. D. Smith (N. Y.), 375; *Williams* v. *Sherman*, 7 Wend. 109.

In an action for use and occupation against one who entered under an agreement for a term, a recovery may be had for the rent of the entire term, although he quitted the premises before its expiration, but a mere tenant at will who had no term vested in him is only liable for

the value of his actual occupation. *Crommelin* v. *Theiss*, 31 Ala. 412. And a recovery cannot be had for rent that has accrued before the execution and delivery of the deed under which the plaintiff claims title. *Smith* v. *Houston*, 16 Ala. 111.

In an action to recover damages for the use and occupation of land, the plaintiff's right to claim damages by reason of the detention of possession ceases when he parts with his title unless there is a special reservation to this effect at the time of the sale, and if by the terms of the sale the right to the possession and the use and enjoyment of the premises are reserved to the plaintiff to as late a day as that on which the suit is instituted, he may recover for the use and occupation of the land down to that time, but where there is no testimony before the jury from which they are authorized to infer that such were the terms upon which the land was sold, a charge of the court based upon such a hypothesis is calculated to mislead the jury. *Patrick* v. *Roach*, 27 Tex. 579.

The common count for use and occupation was declared on, where land was leased to one, in consideration of his paying as rent a certain part of the crop, but no money value fixed, and it was held that the plaintiff could recover under the count the market value of the stipulated part of the crop at the time it should have been delivered. *Butler* v. *Baker*, 5 Ohio St. 584.

*Indebitatus assumpsit* for use and occupation is an equitable action, in which the plaintiff will recover no more than is equitably due, and if the defendant be turned out of possession after making preparations for crops which he could not reap, so that he received no benefit from the occupation, the plaintiff cannot recover any thing. *Wheeler* v. *Shed*, 1 Chip. (Vt.) 208.

§ 9. **Defenses.** An eviction from the whole, or a material part of the premises, by the landlord, is a defense as to the whole rent, so long as such eviction continues, but an eviction from a part by title paramount only entitles to an apportionment of the rent. *Burn* v. *Phelps*, 1 Stark. 94; *McClurg* v. *Price*, 59 Penn. St. 420; *Holmes* v. *Guion*, 44 Mo. 164; *Hayner* v. *Smith*, 63 Ill. 430; S. C., 14 Am. Rep. 124; *Hall* v. *Burgess*, 8 D. & R. 67; S. C., 5 B. & C. 332. But if the tenant, after the eviction, continues in possession of the residue, he is liable upon a quantum meruit. *Stokes* v. *Cooper*, 3 Camp. 514, *n*. Payment or tender of the rent, either in money or in any other way provided by the agreement, a levy of the whole amount due by distress and sale, or any compulsory payment made for the benefit of the landlord, may also be set up as defenses. *Sapsford* v. *Fletcher*, 4 Term R.

511; *Taylor* v. *Zamira*, 6 Taunt. 524; *Carter* v. *Carter*, 5 Bing. 406; S. C., 2 M. & P. 723.

Where the lessors are joint tenants, payment to one of them is a good defense. *Robinson* v. *Hofman*, 1 M. & P. 474; S. C., 4 Bing. 562; 3 C. & P. 234. A surrender in fact and delivery of possession to, and its acceptance by the landlord, is also a good defense (*Elliott* v. *Aiken*, 45 N. H. 30; *Page* v. *Ellsworth*, 44 Barb. 636); and so, that the premises, or a part of them, are occupied for an immoral purpose, with the knowledge or assent of the landlord. *Townsend* v. *Gilsey*, 7 Abb. (N. Y.) N. S. 59; S. C., 1 Sweeney, 155; *Crisp* v. *Churchill*, 1 B. & P. 340; *Appleton* v. *Campbell*, 2 C. & P. 347.

Breaches of covenant on the part of the lessor are no defense to such actions; but the damages occasioned thereby may be usually set up to reduce the recovery, by way of recoupment or counter-claim. *Watts* v. *Coffin*, 11 Johns. 495; *Cook* v. *Soule*, 56 N. Y. (11 Sick.) 420; *Potter* v. *Truitt*, 3 Harring. (Del.) 331. Neither is the destruction of the premises, or their unhealthy or untenantable condition, a defense. *Baker* v. *Holtzpaffell*, 4 Taunt. 45; *Bussman* v. *Ganster*, 72 Penn. St. 285; *Coy* v. *Downie*, 14 Fla. 544. But see *Smith* v. *Marrable*, Car. & M. 479; S. C., 11 M. & W. 5; *Kline* v. *Jacobs*, 68 Penn. St. 57. Vol. 4, p. 272.

Infancy of the lessee at the time of executing the lease is no defense, if the lease is beneficial and was not waived before rent day. Where the premises were demised at an entire rent, it is a good defense that the lessee was not let into full possession. *Holgate* v. *Kay*, 1 C. & K. 341.

The estoppel against disputing the title of the landlord does not prevent the tenant from setting up that such title ended before the rent sued for accrued, but so long as he remains in undisturbed possession, he cannot set up that defense. *Lamson* v. *Clarkson*, 113 Mass. 348; S. C., 18 Am. Rep. 498; *Hardy* v. *Akerly*, 57 Barb. 148.

Where the defendant conveyed a dwelling-house to the plaintiff and continued to occupy it several weeks after the deed, in an action to recover for such use and occupation, the defendant may give parol evidence of a contract that he should thus occupy as part of the consideration of the conveyance. *Quimby* v. *Stebbins*, 55 N. H. 420. The rule that the law refers a possession rather to a rightful than to a wrongful title was applied where a father, for several years preceding his death, used a water-power under a lease, and his sons thenceforth continued his business and the use of the power in the same manner. And, in an action for use and occupation, it was held that the lease was admissible,

and that if their possession was referable to some other title, it devolved upon them to show it. *Page* v. *McGlinch*, 63 Me. 472.

§ 10. **Judgment.** The judgment, if in favor of the plaintiff in an action to recover for use and occupation of real property, would be for the amount agreed to be paid for the use during the period of occupation, or whatever such use and occupation were reasonably worth.

# CHAPTER CXXX.

## WASTE.

### ARTICLE I.

#### OF WASTE IN GENERAL.

**Section 1. Nature and definition.** Waste is one form of encroachment by the owner of one interest in property upon the rights of the owner of some other interest. It may be defined to be any act or omission of duty by a tenant of land which does a lasting injury to the freehold, tends to the permanent loss of any owner of the fee, or to destroy or lessen the value of the inheritance, or to destroy the identity of the property, or impair the evidence of title. *Jones* v. *Chappell*, L. R., 20 Eq. 539; 15 Eng. R. 475; *McGregor* v. *Brown*, 10 N. Y. 117; *Proffitt* v. *Henderson*, 29 Mo. 327; *Huntley* v. *Russell*, 13 Q. B. 588. Thus, in *Doe* v. *Burlington*, 5 Barn. & Ad. 517, it is said that to constitute waste there must be either a diminishing of the value of the estate, or secondly, an increasing of the burdens upon it, or thirdly, an impairing of the evidence of title. This statement is limited by the presumption of law that certain acts are injurious *per se* to the inheritance, as, for instance, the cutting of timber, and in the case of such acts, the only subject of inquiry is, whether such acts have been committed. *McGregor* v. *Brown*, 10 N. Y. 114. The tenant has no right to assume to judge what may be an improvement to the premises, but must confine himself to what his contract and the law permit. *Kidd* v. *Dennison*, 6 Barb. 9; *Agate* v. *Lowenbein* 57 N. Y. (12 Sick.) 604, 613. Thus, it was held waste to convert a brew-house which let for £120 per annum into a dwelling-house, of which the rent was £200. *Bonnett* v. *Sadler*, 14 Ves. 526; *Huntley* v. *Russell*, 13 Q. B. 588. In the early English cases the same presumption was applied to the change of one kind of farming land to another, as wood, meadow or pasture into arable land, or the contrary. *Darcy* v. *Askwith*, Hob. 234, a. It is now generally held that the tenant may justify many acts which are *prima facie* waste by proof that they are in conformity with the rules of good husbandry. *Crockett* v. *Crockett*, 2 Ohio St. 180; *Clemence* v. *Steere*, 1 R. I. 272; *Keeler* v. *Eastman*, 11 Vt. 293; *Phillips* v.

*Smith*, 14 M. & W. 594; *Owen* v. *Hyde*, 6 Yerg. (Tenn.) 334; *Loomis* v. *Wilbur*, 5 Mas. (U. S. C. C.) 13. Reference is also often had to the usages of the place (*Jones* v. *Whitehead*, 1 Pars. [Penn.] 304; *Sarles* v. *Sarles*, 3 Sandf. Ch. 601; *Webster* v. *Webster*, 33 N. H. 25); or to the particular circumstances of the country. Thus, in parts which are new and covered with forest, the tenant has been allowed to cut and sell timber for the purpose of fitting the land for cultivation. *Jackson* v. *Brownson*, 7 Johns. 227; *Adams* v. *Brereton*, 3 Har. & J. (Md.) 124; *Morehouse* v. *Cotheal*, 22 N. J. (2 Zab.) Law, 521; *McCullough* v. *Irvine*, 13 Penn. St. 438; *Harder* v. *Harder*, 26 Barb. 414; *Davis* v. *Gilliam*, 5 Ired. (N. C.) Eq. 311.

Thus, also, it is said that to apply the ancient doctrine of waste in the alteration or improvement of buildings to modern tenancies, even for short terms, would, in some of our cities and villages, put an entire stop to the progress of improvement, and deprive the tenant of those benefits which both parties contemplated at the time of the demise, without any possible advantage to the owner of the reversion. *Winship* v. *Pitts*, 3 Paige, 259.

Waste is either voluntary or permissive. Voluntary waste is the doing of some act which is waste under the foregoing rules. Permissive waste is the neglect of some duty which the tenant owes, which causes injury to the inheritance. Thus, it is voluntary waste to alter the buildings, a corn-mill into a fulling-mill, a dwelling-house into a store, or a hall into a stable (*Greene* v. *Cole*, 2 Saund. 252; *Jackson* v. *Cator*, 5 Ves. 688; *Agate* v. *Lowenbein*, 57 N. Y. 604; *Maunsell* v. *Hart*, 11 Ir. Eq. 478; *Douglass* v. *Wiggins*, 1 Johns. Ch. 435); to cut timber (*Pynchon* v. *Stearns*, 11 Metc. 304; *Jackson* v. *Tibbits*, 3 Wend. 341; *Lynn's Appeal*, 31 Penn. St. 44; *Drown* v. *Smith*, 52 Me. 141); to open new mines, to dig and carry away the soil (*Livingston* v. *Reynolds*, 2 Hill, 157; *Coates* v. *Cheever*, 1 Cow. 460; *Huntley* v. *Russell*, 13 Q. B. 591); or to vary in any manner the quality of the soil, the nature of its products, or of the permanent erections upon it. It is permissive waste to omit to keep the buildings in good repair, to suffer the timbers to become rotten by neglecting to cover the house, or to suffer the walls to fall into decay for want of plastering (Co. Litt. 53 a); or the foundation to be injured by neglecting to turn off water (*Sticklebooue* v. *Hatchman*, Owen, 43); or to suffer a sea wall to become ruinous, so that the sea or a river overflows a meadow and spoils it (*Griffith's Case*, Moore, 69); or negligently to suffer buildings to be burned. *Rook* v. *Worth*, 1 Ves. Sr. 462; *Cornish* v. *Strutton*, 8 B. Monr. (Ky.) 586. Where the tenancy is without impeachment of waste, the tenant is authorized to cut timber or open new mines and convert

the produce to his own use. *Pyne* v. *Dorr*, 1 T. R. 55; *Williams* v. *Williams*, 15 Ves. 425. But in equity this right is limited, and the tenant can only do what a prudent tenant in fee would do. He cannot, therefore, pull down or dilapidate houses, destroy pleasure grounds, or prostrate trees planted for shelter. *Vane* v. *Barnard*, 2 Vern. 738. In such case the waste is called equitable waste, and it will be restrained by injunction, but only with reference to the intention of the person who created the estate. *Marker* v. *Marker*, 9 Hare, 1.

§ 2. **What is waste.** As we have seen, in general any change in the estate to the injury of the reversioner is waste. The first and most important branch concerns the dealings of the tenant with trees growing upon the estate. The tenant cannot cut timber on the premises, with certain exceptions. What is timber depends first on the general law, and second on the special custom of the locality. The trees must be twenty years old and yet not so old as not to have a reasonable quantity of usable wood in them. *Honywood* v. *Honywood*, L. R., 18 Eq. 306; 9 Eng. Rep. 819. Timber trees are those used for building or reparation of houses. 22 Vin. Ab. 442; *Chandos* v. *Talbot*, 2 P. Wms. 606. Thus in England, oak, ash and elm are timber, and in York, birch trees were held to be timber, because they were used in building sheep houses, cottages and such mean buildings. *Cumberland's Case*, Moo. 812. Once arrive at the fact what is timber, and the tenant for life cannot cut it down. *Honywood* v. *Honywood*, L. R., 18 Eq. 306; 9 Eng. Rep. 819; *Alexander* v. *Fisher*, 7 Ala. 514.

It is waste to cut wood which is not timber as too young; if it is done unseasonably, or in such a manner as to injure the reproductive capacity of the stools, or to cut ornamental trees, or those planted for the protection of buildings or banks, or fruit trees in an orchard or garden, or to grubb up a quickset hedge of white thorn. *Dunn* v. *Bryan*, 7 Ir. Eq. 143. In determining whether the trees are ornamental trees or not, it is important to consider whether they have been treated as such by the owner of the premises. Id.; *Hawley* v. *Wolverton*, 5 Paige, 522; *Marker* v. *Marker*, 9 Hare, 1; *Honywood* v. *Honywood*, L. R., 18 Eq. 306; 9 Eng. 819. There are certain exceptions which we consider in the next section. The tenant cannot cut down light wood for tar. *Parkins* v. *Coxe*, 2 Hayw. (N. C.) 339. Where the tenant has the right to cut in the exercise of good husbandry, any encroachment on what should be left as a provision for fire-wood and repairs is waste. *People* v. *Davison*, 4 Barb. 109. A widow cannot make turpentine on land which her husband had not so used. *Carr* v. *Carr*, 4 Dev. & B. (N. C.) L. 179. Where a tenant

has been allowed to cut for the purpose of clearing land, he may not, under this pretext, cut with a view to the profit from a sale, and he will not be permitted, just before the expiration of his lease, to cut down timber. *Kidd* v. *Dennison*, 6 Barb. 9; *Davis* v. *Gilliam*, 5 Ired. (N. C.) Eq. 308; *Parkins* v. *Coxe*, 2 Hayw. (N. C.) 339. Where the tenant claimed the right to cut the timber for repairs, he cannot sell it, and out of the proceeds repair the house. 22 Vin. Abr. 453. So, if he cuts timber and it turns out to be unsuitable, and he then exchanges it, for he must at his peril select such trees as are suitable for the purpose. *Simmons* v. *Norton*, 7 Bing. 640. But in *Loomis* v. *Wilbur*, 5 Mas. (U. S. C. C.) 13, he was allowed to cut timber and sell it to procure boards, that being the most beneficial mode for the estate. Whether the trees were cut with the *bona fide* intention of applying them to repairs is always a question for the jury. *Doe* v. *Wilson*, 11 East, 56. Other kinds of waste are the opening of new gravel pits in the land, and digging and selling gravel therefrom, or digging up and selling the soil or clay where that was not the usual mode of improving the land, or digging the clay and making it into bricks for sale. *Huntley* v. *Russell*, 13 Q. B. 572; *Livingston* v. *Reynolds*, 2 Hill, 157. And so of limestone or the like, when not dug for the reparation of buildings or the manuring of the land. Co. Inst., 53 to 54, b; *Moyle* v. *Moyle*, Owen, 66. So to open land to search for mines, or to open new mines (*Saunders' Case*, 5 Rep. 12; *Stoughton* v. *Leigh*, 1 Taunt. 402; *Darcy* v. *Askwith*, Hob. 234; *Viner* v. *Vaughan*, 2 Beav. 466; *Irwin* v. *Covode*, 24 Penn. St. 162; *Owings* v. *Emery*, 6 Gill [Md.], 260); to destroy or suffer to be destroyed the stock of a dove-cote, park, warren, or fish pond (*Vavasor's Case*, 2 Leon, 222; *Moyle* v. *Moyle*, Owen, 66); to remove stone walls. *Thacher* v. *Phinney*, 7 Allen (Mass.), 146. In relation to buildings, waste may be committed either by pulling them down or suffering them to remain uncovered whereby the timbers rot, or by removing fixtures or permanent improvements, though erected by the tenant. *Austin* v. *Stevens*, 24 Me. 520; *Wall* v. *Hinds*, 4 Gray (Mass.), 256; *Clemence* v. *Steere*, 1 R. I. 272; Co. Litt. 53, a. He is bound to use ordinary care to prevent the buildings from going to decay. *Wilson* v. *Edmonds*, 24 N. H. 517. He must cultivate the land in a husbandlike manner and in conformity to the usual and reasonable custom of the country. *Powley* v. *Walker*, 5 T. R. 373; *Wilds* v. *Layton*, 1 Del. Ch. 226. This, however, extends only to the usual course of cultivation, and not to any extraordinary mode of agriculture. The sale of hay or grass from the farm which ought to be fed on it, or the impoverishment of the fields by constant tillage from year to year, is waste (*Sarles* v.

*Sarles*, 3 Sandf. Ch. 601; *Moulton* v. *Robinson*, 27 N. H. 550); or the sale of manure (*Plumer* v. *Plumer*, 30 N. H. 558; *Daniels* v. *Pond*, 21 Pick. [Mass.] 371; *Lewis* v. *Jones*, 17 Penn. St. 262; *Middlebrook* v. *Corwin*, 15 Wend. 169); or digging turf by tenants. *Harris* v. *Mins*, 20 W. R. 999; *Courtown* v. *Ward*, 1 Sch. & Lef. 8. The old rule that the conversion of arable into pasture land, or change in the kind of land is waste, is now modified, and the question is, was it justified by good husbandry and the usages of the place? *Crockett* v. *Crockett*, 2 Ohio St. 180; *Keeler* v. *Eastman*, 11 Vt. 293; *Phillips* v. *Smith*, 14 M. & W. 594; *Sarles* v. *Sarles*, 3 Sandf. Ch. 601; *Webster* v. *Webster*, 33 N. H. 25. But to suffer pastures to become overgrown with brush or to attempt to reconvert land grown up with wood into pasture, has been held waste. *Clemence* v. *Steere*, 1 R. I. 272; *Clark* v. *Holden*, 7 Gray (Mass.), 8. The tenant is liable for waste done upon the premises by a stranger, but he will not be for what is done by the act of God, the public enemies, or the law. But if a house is unroofed by a tempest, the tenant may not suffer it to remain so. That is, he must use ordinary exertions for the preservationof the property. Co. Litt. 53, *a*; *Pollard* v. *Shaaffer*, 1 Dall. 210; *Griffith's Case*, Moore, 69; *White* v. *Wagner*, 4 Harr. & J. (Md.) 373. If the waste is by cutting timber, properly so called, the property in the timber cut down, either by the tenant or anybody else, or blown down by a storm, belongs at law to the owner of the first vested estate of inheritance, except that in some cases where the timber is cut under an order of court, the court disposes of the proceeds on equitable principles and makes them follow the interests in the estate. *Honywood* v. *Honywood*, L. R., 18 Eq. 306; 9 Eng. 819. So in case of the commission of equitable waste, that is, where ornamental trees, or trees which could not otherwise be cut down, even by a tenant for life, unimpeachable for waste, are cut. In case of trees not timber, either from their nature or because they are too young or too old, whether cut rightfully or wrongfully, the property vests in the tenant. Id.; *Berriman* v. *Peacock*, 9 Bing. 386; *Mooers* v. *Wait*, 3 Wend. 104; *Bulkley* v. *Dolbeare*, 7 Conn. 233; *Channon* v. *Patch*, 5 B. & C. 897. Where the tenant is allowed to cut timber in clearing the land, it belongs to him. *Crockett* v. *Crockett*, 2 Ohio St. 180; *Davis* v. *Gilliam*, 5 Ired. (N. C.) Eq. 311.

§ 3. **What is not waste.** No act is waste when it is such as a prudent owner would do upon his own land having regard to the land as an inheritance, and which would not diminish the value of the land as an estate. *Givens* v. *McCalmont*, 4 Watts (Penn.), 460; *Chase* v. *Hazelton*, 7 N. H. 171; *Smith* v. *Poyas*, 2 Des. (S. C.) 65; *Hickman*

v. *Irvine*, 3 Dana (Ky.), 121. Accordingly, in States where the land is new and covered with forest, the tenant has been allowed to clear the land, it being for the jury in each case to determine whether in clearing it the tenant had cut so much timber as to injure the inheritance. *Jackson* v. *Brownson*, 7 Johns. 227; *Moorehouse* v. *Cotheal*, 22 N. J. (2 Zabr.) L. 521; *Keeler* v. *Eastman*, 11 Vt. 293; *McCullough* v. *Irvine*, 13 Penn. St. 438; *Drown* v. *Smith*, 52 Me. 141; *Woodward* v. *Gates*, 38 Ga. 205; *Harder* v. *Harder*, 26 Barb. 414. A doweress has been allowed to clear for cultivation a reasonable proportion of the lands set out to her. *Hastings* v. *Crunkleton*, 3 Yeat. (Penn.) 261; *Findlay* v. *Smith*, 6 Munf. (Va.) 134; *Alexander* v. *Fisher*, 7 Ala. 514; *Ballentine* v. *Poyner*, 2 Hayw. (N. C.) 110; *Owen* v. *Hyde*, 6 Yerg. (Tenn.) 334. If the mode of using the land has been to cut the growth upon it as the customary source of profit, she may continue to do so. *Ballentine* v. *Poyner*, 2 Hayw. (N. C.) 110; *Clemence* v. *Steere*, 1 R. I. 272. Where her husband had used the trees to make turpentine, she may continue to do so and take new trees to keep up the supply. *Carr* v. *Carr*, 4 Dev. & B. (N. C.) L. 179. She is not limited by the fact that the reversion of different lots may be in different persons but may cut, in good faith, on either lot, to use on the others. *Owen* v. *Hyde*, 6 Yerg. (Tenn.) 334; *Padelford* v. *Padelford*, 7 Pick. (Mass.) 152; *Dalton* v. *Dalton*, 7 Ired. (N. C.) Eq. 197. She may cut reasonable firewood for herself and her servants though they occupy separate houses. *Gardiner* v. *Derring*, 1 Paige, 573. Cutting trees under twenty years old though timber trees is not waste if they are cut seasonably and in a proper manner, that is according to what has been done with them before or to the custom of the neighborhood. *Dunn* v. *Bryan*, 7 Ir. Eq. 143. He may cut down trees in the course of proper management in order to allow the growth of other timber. *Cowley* v. *Wellesley*, L. R., 1 Eq. 656. He may cut down all trees which will not be timber and are not trees for ornament or the protection of the estate. *Honywood* v. *Honywood*, L. R., 18 Eq. 306; 9 Eng. 819. He may cut on timber estates, that is estates which are cultivated for the produce of saleable timber and where the timber is cut periodically. Id.; *Bagot* v. *Bagot*, 32 Beav. 509. He may cut coppices and underwoods according to custom and at seasonable times, and thin firtrees. *Pidgeley* v. *Rawling*, 2 Coll. 275; *Edge* v. *Pemberton*, 12 M. & W. 187. Where land was used with and let with a furnace, wood may be cut on the premises for the furnace. *Den* v. *Kinney*, 5 N. J. (2 South.) L. 552; *Findlay* v. *Smith*, 6 Munf. (Va.) 134. The tenant whether for life or years may cut timber for necessary repairs of the house and fences, though he has agreed to repair at his own expense. *Harder* v. *Harder*, 26 Barb. 409. But it

must be for such buildings as were on the land and not such as he may have afterward erected. Co. Litt. 53 *a*. He is entitled to take reasonable estovers, that is wood from the land for fuel, fences, agricultural erections and other necessary improvements. *Gardiner* v. *Derring*, 1 Paige, 573. If the house is destroyed or injured, he may cut timber to repair it, but not for a new house or new fences. *Darcy* v. *Askwith*, Hob. 238; *Miles* v. *Miles*, 32 N. H. 147. The cutting must be for immediate repairs and not for those caused by his own wrong. *Padelford* v. *Padelford*, 7 Pick. (Mass.) 152. He cannot omit to take firewood for years and then take a large amount by way of compensation. *Clarke* v. *Cummings*, 5 Barb. 339. He cannot sell the timber and use the proceeds in repairs. *Doe* v. *Wilson*, 11 East, 56; *Simmons* v. *Norton*, 7 Bing. 640; *Johnson* v. *Johnson*, 18 N. H. 594; *contra*, *Loomis* v. *Wilbur*, 5 Mas. (U. S. C. C.) 13. Whether the cutting is in good faith for estovers is a question for the jury. *Doe* v. *Wilson*, 11 East, 56. He cannot cut for firewood while there is sufficient dead wood on the premises for his consumption. *Simmons* v. *Norton*, 7 Bing. 640. It is not waste for a tenant to erect new buildings on the premises or to make changes in those existing, providing the property is not injured or substantially changed. *Winship* v. *Pitts*, 3 Paige, 259; *Jones* v. *Chappell*, L. R., 20 Eq. 539; 15 Eng. 475; *Young* v. *Spencer*, 10 B. & C. 145; *Jackson* v. *Tibbitts*, 3 Wend. 341; *Beers* v. *St. John*, 16 Conn. 322; *Sarles* v. *Sarles*, 3 Sandf. Ch. 601. Where the tenant has erected buildings for purposes of agriculture or manufacture, which are not so annexed to the realty as to become a part of it, he may remove them, with no restriction except that he may not by such erection and removal essentially injure the inheritance, and they must be removed during the term. *Van Ness* v. *Pacard*, 2 Pet. (U. S.) 137; *Clemence* v. *Steere*, 1 R. I. 272; *Austin* v. *Stevens*, 24 Me. 520; *Dozier* v. *Gregory*, 1 Jones' (N. C.) L. 100; *McCullough* v. *Irvine*, 13 Penn. St. 438; *Washburn* v. *Sproat*, 16 Mass. 449. He may tear down a ruinous building which is dangerous to his cattle. *Clemence* v. *Steere*, 1 R. I. 272. He may defer making repairs till they shall be less expensive, if no permanent injury results. *Harvey* v. *Harvey*, 41 Vt. 373. It is not waste to leave the land uncultivated (*Hutton* v. *Warren*, 1 M. & W. 472), nor is mere ill husbandry. *Richards* v. *Torbert*, 3 Houst. (Del.) 172. It is not waste to continue to dig in mines or pits which are already open and which have become part of the annual profit of the land, and if the mines and pits are named in the lease so as to show an intention that the lessee should have the benefit of them, he may open them. *Crouch* v. *Puryear*, 1 Rand. (Va.) 258. The tenant can open new shafts into the same vein and work the mine even to exhaustion. Id. So where

the tenant was a devisee of salt works, he was allowed an unlimited use of the salt mineral. *Findlay* v. *Smith*, 6 Munf. (Va.) 131; *Neel* v. *Neel*, 19 Penn. St. 324; *Stoughton* v. *Leigh*, 1 Taunt. 402; *Clavering* v. *Clavering*, 2 P. Wms. 388; *Billings* v. *Taylor*, 10 Pick. (Mass.) 460; *Coates* v. *Cheever*, 1 Cow. 460; *Irwin* v. *Covode*, 24 Penn. St. 361. Where clay or marl are taken from the soil to repair the buildings or improve the land, this is not waste. *Moyle* v. *Moyle*, Owen, 66. Nor, if it has been the usual mode of improving the land, will it be waste to continue to dig in the old pits. *Huntley* v. *Russell*, 13 Q. B. 591; *Knight* v. *Mosely*, Amb. 176. It is not waste to dig trenches to carry off water, or to cut turf for actual use. *Courtown* v. *Ward*, 1 Sch. & L. 8. A tenant may open a way over meadow land for his convenience, and dig drains by the side of it, and carry on earth to make it passable, and carry earth upon the low and wet parts of the land. *Pynchon* v. *Stearns*, 11 Metc. (Mass.) 304. By statute in England (6 Anne, c. 31), the tenant is exempted from liability for fires occurring by accident without his carelessness or fault. *Filliter* v. *Phippard*, 11 Q. B. 347. And this law is considered as having been adopted here. *Lansing* v. *Stone*, 37 Barb. 15; 14 Abb. 199; *Maull* v. *Wilson*, 2 Harr. (Del.) 443.

§ 4. **Heir and personal representative.** As ordinarily the executor or administrator has no concern with the real estate, he cannot commit waste in the sense in which it is generally used. Thus, in *Wilbur* v. *Wilbur*, 7 Metc. (Mass.) 249, the court held that a statute giving them jurisdiction of actions of waste did not apply to a case where the administrator was guilty of wasteful management of the property of his intestate. In *Whitney* v. *Monro*, 4 Edw. Ch. 5, where the executors had filed no inventory, and were charged to be wasting the estate, it was held that the surrogate had authority to order them to give security until the inventory should be filed, and the waste stopped and that a court of equity would not interfere. But in *Clark* v. *Henry*, 9 Mo. 339, it was held that where the executor has made his final settlement in the probate court, he can still be charged in equity with waste in not accounting for property which has come into his hands. In some States the administrator of an insolvent estate is entitled to possession (*Gregg* v. *Currier*, 36 N. H. 200); and he would then be charged with waste strictly so called.

§ 5. **Guardian and ward.** A guardian has in some cases been held liable for waste. But where a testator appoints a trustee of all his estate during the infancy of his heir, such trustee is neither a guardian so as to be liable for waste at common law, nor a tenant for life or years or other term so as to be within the statutes against waste. *Kincaird*

v. *Scott*, 12 Johns. 368. A guardian cannot cut timber except for necessary repairs upon the property. *Torry* v. *Black*, 58 N. Y. 185. Where a guardian cut trees upon six acres of land which were of no great value in themselves, and the loss of which did not diminish the value of the inheritance and he accounted for the proceeds, he was not charged with waste. *Bond* v. *Lockwood*, 33 Ill. 212.

§ 6. **Landlord and tenant.** A tenant for years or from year to year must keep the premises wind and water tight (*Auworth* v. *Johnson*, 5 C. & P. 239); and must make fair and tenantable repairs, such as keeping the fences in order or replacing doors and windows that are broken during his occupation. *Cheetham* v. *Hampson*, 4 T. R. 318. If it is a furnished house, he must take care of the furniture and leave it with the linen and other things clean and in good order. *White* v. *Nicholson*, 4 M. & G. 95; *Stanley* v. *Agnew*, 12 M. & W. 827. But he is not bound to rebuild premises which have accidentally become ruinous during his occupation unless he has covenanted to rebuild. *Bullock* v. *Dommit*, 6 T. R. 650. He is not liable for ordinary wear and tear, nor to replace doors and sashes worn out by time, to put a new roof on the building, to make what are called general repairs, nor is he answerable for accidental injury by fire. *Torriano* v. *Young*, 6 C. & P. 8; *Doe* v. *Amey*, 12 Ad. & E. 476. He is not required to do painting, whitewashing or papering. *Wise* v. *Metcalfe*, 10 B. & C. 299. He is entitled to his estovers for repairs and firewood. *Harder* v. *Harder*, 26 Barb. 409. Although his active duties are less he is allowed less benefit from the premises than a tenant for life. *Long* v. *Fitzimmons*, 1 Watts & S. 530. Where his lease allows him to make additions and repairs he may make such alterations as would otherwise be waste. *Hasty* v. *Wheeler*, 12 Me. 434. Where the farm is let as a dairy farm to a tenant for years, clearing woodland is in itself waste. *McGregor* v. *Brown*, 10 N. Y. 114. Where the whole land leased was wild except a few acres, it will be presumed that it was the intention that the lessee should fell timber in order to fit land for cultivation, but he cannot destroy all the timber and irreparably injure the premises or permanently diminish their value. *Kidd* v. *Dennison*, 6 Barb. 9. In Pennsylvania the landlord was granted a writ of estrepment without a previous notice to quit, but it is no ground for writ where the lease is for mining purposes, that the tenant is mining without paying rent, is erecting buildings, and is driving faults on different tracts of the land without the knowledge of the heirs, and with money which should have been used to pay rent. *Heil* v. *Strong*, 44 Penn. St. 264. It is not waste to make erections which can be removed, leaving the property as before, and the materials of which would more than pay the expense.

*Winship* v. *Pitts*, 3 Paige, 259. Where the lease allowed alterations, to be approved of by the lessor the lessee cannot make material alterations against his consent, as by changing a dwelling-house into a store. *Douglass* v. *Wiggins*, 1 Johns. Ch. 435. Where the tenant, being also lessee of the adjoining premises, builds on them so as to darken windows in the leased premises, he is not liable to an injunction. *Atkins* v. *Chilson*, 7 Mete. (Mass.) 398. Where the remainder-man takes a lease of part of the particular estate, he cannot maintain waste for an injury to it, for the estates merge. *Pynchon* v. *Stearns*, 11 Mete. (Mass.) 304. Where a tenant at sufferance turned hogs into a meadow which rooted up and injured the turf, and he also cut and carried away fruit trees, he is liable for waste. *Bellows* v. *McGinnis*, 17 Ind. 64. If a tenant at will commits waste it is a termination of the estate at will, and he is liable in trespass. *Daniels* v. *Pond*, 21 Pick. (Mass.) 367; *Ruckman* v. *Outwater*, 28 N. J. (4 Dutch.) Eq. 581. A lessee for years cannot sue for waste (*McLaughlin* v. *Long*, 5 Harr. & J. [Md.] 113); nor a tenant for life. *Mollineux* v. *Powell*, 3 P. Wms. 268.

§ 7. **Mortgagor and mortgagee.** A mortgagee may maintain an action on the case against a mortgagor, or a person claiming under him, for waste committed upon the mortgaged premises after forfeiture of the mortgage, and after a decree for the sale of the premises, where the mortgagor is insolvent, and the premises are a slender security for the debt. *Southworth* v. *Van Pelt*, 3 Barb. 347; *Hampton* v. *Hodges*, 8 Ves. 105. An action will lie against the holder of the equity of redemption for acts of waste committed with knowledge that they endangered the security, as by cutting valuable timber and removing fences. *Van Pelt* v. *McGraw*, 4 Comst. 110. The owner of the equity of redemption has no more right than a stranger to impair the security of the mortgagee by removal of buildings or fixtures thereby causing substantial and permanent injury and depreciation to the property. Ib. In Massachusetts the right of action does not depend upon proof of the insufficiency of the remaining security. The mortgagee is not obliged to accept what remains as satisfaction *pro tanto* of his debt at any valuation whatever. He is entitled to the full benefit of the entire mortgaged estate for the full payment of his entire debt. *Byrom* v. *Chapin*, 113 Mass. 308; *Salmon* v. *Clagett*, 3 Bland (Md.), 180. It has been held that an action of waste could not be maintained till after forfeiture. *Peterson* v. *Clark*, 15 Johns. 205; *Wakeman* v. *Banks*, 2 Conn. 445. And that waste done could not be made an item of charge in an account stated between the mortgagee and mortgagor, or in a bill to redeem. *Boston Iron Co.* v. *King*, 2 Cush. (Mass.) 400. If a mortgagor in possession cut down and carry away timber, he is liable

in trespass (*Stowell* v. *Pike*, 2 Greenl. [Me.] 387; *Page* v. *Robinson*, 10 Cush. [Mass.] 99); or case in the nature of waste. *Langdon* v. *Paul*, 22 Vt. 205. But perhaps in case of wild land a custom to do so might be equivalent to a license. Id. In such case a second mortgagee may maintain trespass after a discharge of the first mortgage. *Sanders* v. *Reed*, 12 N. H. 558. The mortgagor is liable for a removal of fixtures (*Hitchman* v. *Walton*, 4 Mees. & W. 409); though erected after the mortgage was given. *Smith* v. *Goodwin*, 2 Greenl. (Me.) 173; *Burnside* v. *Twitchell*, 43 N. H. 390. Where the cutting of timber is under license, express or implied, from the mortgagee, it belongs to the mortgagor, otherwise to the mortgagee. *Smith* v. *Moore*, 11 N. H. 55; *Gore* v. *Jenness*, 19 Me. 53; *Lull* v. *Matthews*, 19 Vt. 322. The mortgagee was not allowed an action of waste against the mortgagor before foreclosure in *Peterson* v. *Clark*, 15 Johns. 205. But he is not without remedy, for he may have an injunction and an account (Id.; *Hastings* v. *Perry*, 20 Vt. 272); or sustain a special action on the case which lies even in favor of a third mortgagee, but it would be a defense that a settlement had been made in good faith with a prior mortgagee. *Gooding* v. *Shea*, 103 Mass. 360; 4 Am. Rep. 563. In other cases the mortgagee has not been allowed an action for injuries by a third person unless they are committed with the express intent to wrong and defraud him, and the mortgagor is unable to pay the mortgage debt. *Lane* v. *Hitchcock*, 14 Johns. 213. The ordinary remedy for the mortgagee against the mortgagor to protect the premises is by bringing a bill in equity for an injunction. *Cooper* v. *Davis*, 15 Conn. 556; *Brady* v. *Waldron*, 2 Johns. Ch. 148; *Salmon* v. *Clagett*, 3 Bland (Md.), 180; *Scott* v. *Wharton*, 2 Hen. & M. (Va.) 25; *Gray* v. *Baldwin*, 8 Blackf. (Ind.) 164; *Bunker* v. *Locke*, 15 Wis. 635; *Vanderslice* v. *Knapp*, 20 Kans. 647; *Hampton* v. *Hodges*, 8 Ves. 105; *Goodman* v. *Kine*, 8 Beav. 379. When the mortgagee has taken possession, he was not at law accountable for waste (*Evans* v. *Thomas*, Cro. Jac. 172; *McCormick* v. *Digby*, 8 Blackf. [Ind.] 99); and can only be reached in equity. *Furbush* v. *Goodwin*, 29 N. H. 321; *Smith* v. *Johns*, 3 Gray (Mass.), 517; *Irwin* v. *Davidson*, 3 Ired. (N. C.) Eq. 311. Thus, in one case (*Hansom* v. *Derby*, 2 Vern. 392); he was ordered to deliver up the premises to the mortgagor, who was a pauper, pending a bill to redeem; nd he is held to a strict account for using the premises in a way inconsistent with the legitimate purposes of security. *Shaeffer* v. *Chambers*, 2 Halst. Ch. (6 N. J. Eq.) 548; *Givens* v. *McCalmont*, 4 Watts, 460. If he unnecessarily pulls down buildings and erects new ones without the mortgagor's consent, he is liable for any consequent loss of rent, and

will not be allowed for lasting improvements and repairs unless the result of the whole is to increase the value of the property. *Landon* v. *Hooper*, 6 Beav. 246. The money arising from timber cut will be applied first to the interest and then to the principal. *Hansom* v. *Derby*, 2 Vern. 392; *Farrant* v. *Lovel*, 3 Atk. 723. If, after judgment for redemption, and before possession under it has been actually delivered to the mortgagor, the mortgagee does acts injurious to the inheritance, the mortgagor, when he shall have regained possession, may have an action in the nature of waste for such injury. *Taylor* v. *Townsend*, 8 Mass. 411. The removal of fixtures by the mortgagee after a foreclosure sale and before the deed is given is waste for which the purchaser may sue. *Lackas* v. *Bahl*, 43 Wis. 53.

§ 8. **Reversioner, remainderman and tenant for life.** An estate for life may be created by law, as in case of estates of dower; and by the courtesy or by deed. In the former case, the tenant was always liable for waste, in the latter it depends upon the statute of Marlbridge, which has been adopted as common law here (*Sackett* v. *Sackett*, 8 Pick. [Mass.] 312), unless it is limited or changed by the words of the instrument creating it. This change may be by making the tenant expressly dispunishable for waste or without impeachment of waste, in which case they are only responsible for equitable waste, as we have before explained, *ante*, pp. 238, 240, §§ 1, 2. The words "in strict settlement" do not make the tenant dispunishable for waste. *Stanley* v. *Coulthurst*, L. R., 10 Eq. 259. The right of the tenant may also be enlarged by the evident purpose of the lease. Hence where the whole of a farm when leased is in a wild and uncultivated state, the parties will be held to have intended that the lessee should be at liberty to fell part of the timber to fit the land for cultivation. *Kidd* v. *Dennison*, 6 Barb. 9. An act restricting tenants for life from committing waste embraces tenants for life created by will. *Hamden* v. *Rice*, 24 Conn. 350. Improvements will not excuse or justify waste when they are beneficial to the tenant only, and may be used up and gone before the expiration of the tenancy. *Van Syckel* v. *Emery*, 18 N. J. Eq. (3 Green) 387. If the owner of a farm convey it in fee, and take back a conveyance for life, his former practice in the manner of taking wood for fuel does not enlarge his right as life tenant. *Webster* v. *Webster*, 33 N. H. 18. Tenants in common for life, are liable to the reversioner for, an injury to the inheritance by a stranger, or by a part of the tenants in common. *Wood* v. *Griffin*, 46 N. H. 230. One who has only a contingent remainder or executory devise cannot maintain waste. *Hunt* v. *Hall*, 37 Me. 363. One who has a remainder for life only cannot sue for waste. *Mayo* v. *Feaster*, 2 McCord's (S. C.) Ch. 137. A reversioner may recover after he

has sold his interest in the land or estate, for waste committed before such sale. *Robinson* v. *Wheeler*, 25 N. Y. 252. The action against a tenant for life by devise does not survive. *Browne* v. *Blick*, 3 Murph. (N. C.) 511.

§ 9. **Tenants in common.** It has been held that one tenant in common may be liable to another for waste. This subject, however, is usually regulated by statute. Taking fixtures and implements from a ruinous mill and using them in his own, or even burning some rotten timbers of the mill dam, was held not waste. *Dodd* v. *Watson*, 4 Jones' (N. C.) Eq. 48. Cutting down and clearing wood land was held waste. *Johnson* v. *Johnson*, 2 Hill's (S. C.) Ch. 277. The statute giving damages to one tenant in common for waste by another applies only where the tenancy is admitted. *Prescott* v. *Nevers*, 4 Mas. (C. C.) 326. The action given by the North Carolina statute is confined to cases of permanent injury. *Smith* v. *Sharpe*, Busb. (N. C.) L. 91. Where a petition for partition is pending, an injunction against waste will be granted. *Hawley* v. *Clowes*, 2 Johns. Ch. 122. After partition decreed the tenant will not be enjoined from farming contrary to the custom of the country, between landlord and tenant. *Bailey* v. *Hobson*, L. R., 5 Ch. App. 180.

## ARTICLE II.

### REMEDIES.

**Section 1. In general.** At common law, a right of action existed only in cases of tenancies created by the law itself, that is, tenancies in dower, and curtesy. These were created by the law and it was thought that the law was bound to protect the remainderman or reversioner from injury. But where the tenancy was created by contract, it was left to the parties to establish the terms and provide against waste. But by the statute of Marlborough, 52 Hen. III, ch. 24, the landlord was given a right to recover his actual damages in all cases of waste by tenants, and by the statute of Gloucester 6 Edw. I, ch. 5, the penalty was increased to treble damages and a forfeiture of the premises. *Sackett* v. *Sackett*, 8 Pick. (Mass.) 312; *Chipman* v. *Emeric*, 3 Cal. 283. At common law there were two remedies for waste, one by writ of prohibition where it had been threatened, the other by writ of waste for waste actually done. Co. 2nd Inst. 300. The forfeiture given of the thing wasted extended only to the part actually wasted if it was separable. If done *sparsim* through a wood, the whole lot was forfeited. If in several rooms of a house, the whole house. If only in a part of the wood or in one room of a house such part only, if sep-

arable, was lost. Co. 2d Inst. 299, 303. If the tenant repaired the waste before action, he was excused. *Jackson* v. *Andrew*, 18 Johns. 431. Privity was necessary between the parties to the action of waste and it was defeated by an assignment or descent. Co. Litt. 53 b.; *Foot* v. *Dickinson*, 2 Mete. (Mass.) 611; *Bates* v. *Shraeder*, 13 Johns. 263. But this whole matter has been largely modified by statute. An action upon the case in the nature of waste, for waste actually done, was however a common-law remedy, which could be maintained by any one who had a reversionary interest, against any one who injures the estate, but he could not maintain both case and waste. *Chase* v. *Hazelton*, 7 N. H. 178; *Stetson* v. *Day*, 51 Me. 434. Only the immediate reversioner could maintain waste. Any person holding a more distant estate could, however, assert his right to property severed from the estate in any appropriate action. The courts differ as to the extent to which the old common-law remedies have been adopted here and they have generally fallen into disuse. *McCullough* v. *Irvine*, 13 Penn. St. 438; *Sackett* v. *Sackett*, 8 Pick. (Mass.) 309; *Randall* v. *Cleaveland*, 6 Conn. 328; *Smith* v. *Follansbee*, 13 Me. 273; *Parker* v. *Chambliss*, 12 Ga. 235.

§ 2. **Who may sue.** The action of waste could only be brought by the person who had the next immediate estate of inheritance in reversion or remainder, and a person having an expectant interest in land less than the inheritance cannot maintain it. *Peterson* v. *Clark*, 15 Johns. 205. Nor can one having a contingent remainder or entitled upon a contingency to an executory devise. *Hunt* v. *Hall*, 37 Me. 363; *Bacon* v. *Smith*, 1 Q. B. 345. If the reversioner has any other interest, he may resort to an action on the case in the nature of waste, and recover the actual damage done. *Chase* v. *Hazelton*, 7 N. H. 175. As we have seen, it has sometimes been held that neither of these actions would lie unless there was privity of estate. Thus they were not sustained between the assignee of the reversion and the assignee of a doweress. *Foot* v. *Dickenson*, 2 Mete. (Mass.) 611. But the heir of the reversioner could have waste against the doweress after her assignment. So might the assignee of the heir of the reversioner against the assignee of a life estate created by contract. *Bates* v. *Shraeder*, 13 Johns. 260; *Walker's Case*, 3 Rep. 23. The non-joinder of a joint owner must be pleaded in abatement or it will only be ground for apportionment of damages. *Achey* v. *Hull*, 7 Mich. 423. The plaintiff must have the legal title. *Gillett* v. *Treganza*, 13 Wis. 472.

§ 3. **Who may be sued.** Any tenant may be liable to this action. Thus a tenant in dower is ordinarily held liable for the commission of waste. *Parker* v. *Chambliss*, 12 Ga. 235; *Harvey* v. *Harvey*, 41 Vt.

373; *Short* v. *Piper*, 4 Harr. (Del.) 181. But in *Smith* v. *Follansbee*, 13 Me. 273, the right of action was denied. But after she has assigned her estate, she is not liable to the assignee of the reversion for waste committed by her assignee. *Foot* v. *Dickinson*, 2 Metc. (Mass.) 611. The husband of a tenant in dower who removes a building, even though he built it himself, is liable whether his wife is living or dead, but not for permissive waste after her death and the surrender of his possession. *Dozier* v. *Gregory*, 1 Jones' (N. C.) L. 100. A tenant by the curtesy may be liable for waste. *Morgan* v. *Larned*, 10 Metc. (Mass.) 50; *Davis* v. *Gilliam*, 5 Ired. (N. C.) Eq. 308. A husband and wife may be jointly liable. *Bacon* v. *Smith*, 1 Ad. & El. (N. S.) 345; *Dejarnette* v. *Allen*, 5 Gratt. (Va.) 499. It does not lie against the assignee of a tenant by the curtesy (*Bates* v. *Shraeder*, 13 Johns. 260); nor against a tenant by elegit. *Scott* v. *Lenox*, 2 Brock. (U. S. C. C.) 57. The distinction in many of these cases is between the action of waste, strictly so called, and an action upon the case in the nature of waste. Case lies against the assignee of a lessee (*Short* v. *Wilson*, 13 Johns. 33); but not even this for permissive waste (*Jones* v. *Hill*, 7 Taunt. 392); nor against the tenant himself if he holds the premises under an express covenant to repair. *Jones* v. *Hill*, 7 Taunt. 392; *contra*, *Moore* v. *Townshend*, 33 N. J. Law, 284. After the expiration of his term, waste will lie against a tenant for years as well as covenant for a breach of the covenants contained in his lease. *Schermerhorn* v. *Buell*, 4 Den. 422; *Kinlyside* v. *Thornton*, 2 W. Bla. 1111.

A guardian has been held liable to action, but not a testamentary trustee. *Kincaid* v. *Scott*, 12 Johns. 368. A tenant in common may be liable. *Smith* v. *Sharpe*, Busb. (N. C.) L. 91. A tenant at will has been made to respond for trespass in an action of trespass, *quare clausum fregit*. *Daniels* v. *Pond*, 21 Pick. (Mass.) 367. A sub-tenant may be sued (*Rutherford* v. *Aiken*, 3 Thomp. & C. 60; *Harnett* v. *Maitland*, 16 M. & W. 257); and even a stranger may be liable to an action on the case. *Chase* v. *Hazelton*, 7 N. H. 175; *Elliot* v. *Smith*, 2 id. 430; *Randall* v. *Cleaveland*, 6 Conn. 328. The remedy for wrongs of this nature has been extended beyond the case of persons technically tenants to that of any persons lawfully in possession of land. Thus a purchaser of lands is responsible for a negligent burning of the building upon a rescission of the contract. *Cornish* v. *Strutton*, 8 B. Monr. (Ky.) 586. An execution debtor is liable for waste after sale and before possession by the purchaser. *Rich* v. *Baker*, 3 Den. 79; *Thomas* v. *Crofut*, 14 N. Y. 474. Where lands are exchanged an action lies after the contract but before the deeds and possession are given. *Marsh* v. *Current*, 6 B. Monr. (Ky.) 493. Any entering and holding by the

permission of the owner and subservient to the owner, constitutes a sufficient tenancy to make the occupier liable to action. *Freeman* v. *Headley*, 33 N. J. Law, 523. A party in adverse possession may be sued for waste, especially after ejectment brought against him. *People* v. *Davison*, 4 Barb. 109.

§ 4. **Action at law.** As we have already seen the plaintiff's remedy may take a variety of forms. At common law, the person having the next immediate estate of inheritance in reversion or remainder could maintain an action of waste, in which he could recover the place wasted and treble damages, provided there was privity of action or privity of estate between the parties. *Bates* v. *Shraeder*, 13 Johns. 260; *Walker's Case*, 3 Rep. 23; *Foot* v. *Dickinson*, 2 Metc. (Mass.) 611. If this privity did not exist, then an action upon the case in the nature of waste would still lie, in which the actual damages could be recovered by any one having a reversionary interest against any one who did the injury, whether lessee or stranger. *Chase* v. *Hazelton*, 7 N. H. 175; *Elliot* v. *Smith*, 2 id. 430. In many cases, the reversioner may have his election between these two remedies, but he cannot maintain both. *Stetson* v. *Day*, 51 Me. 434. The reversioner also, where the waste has been in the removal of timber, hay, manure or fixtures, may seize them if he can find them, or bring trover for their conversion, or replevy them, or bring trespass *de bonis* for the taking of them. Nor does it matter whether the timber is cut by a stranger or by the tenant. *Bowles' Case*, 11 Rep. 82; *Richardson* v. *York*, 14 Me. 216; *Bulkley* v. *Dolbeare*, 7 Conn. 233; *Mooers* v. *Wait*, 3 Wend. 104; *Plumer* v. *Plumer*, 30 N. H. 558. If the tenant has sold the timber, the reversioner may bring an action for money had and received against him. *Leagram* v. *Knight*, L. R., 2 Ch. App. 631. If the trees are cut by a stranger, both the tenant and the reversioner may have actions; the tenant, trespass, for the injury to his possession; and the reversioner, case or trespass, if the trees are removed, as they are then his absolute property. *Lane* v. *Thompson*, 43 N. H. 324. If a tenant at will commits waste, it is held a determination of the estate at will and trespass *quare clausum fregit* will lie. *Daniels* v. *Pond*, 21 Pick. (Mass.) 367. If the tenancy is by written lease with covenants, he may be liable after the expiration of his term to an action of covenant on his lease, or of case for waste. *Kinlyside* v. *Thornton*, 2 W. Bla. 1111; *Burchell* v. *Hornsby*, 1 Camp. 360. But an action on the case for permissive waste does not lie where the premises are held under an express covenant to repair. *Jones* v. *Hill*, 7 Taunt. 392. Where trees were blown down by a tempest, it was held that trover, not waste, was the proper remedy against one who carried them away. *Shult* v.

*Barker*, 12 S. & R. 272. A mortgagor who cut down and carried away timber was held liable in trespass. *Stowell* v. *Pike*, 2 Greenl. (Me.) 387; *Page* v. *Robinson*, 10 Cush. (Mass.) 99; *Harris* v. *Haynes*, 34 Vt. 220; *Cooper* v. *Davis*, 15 Conn. 556; *Burnside* v. *Twitchell*, 43 N. H. 390. The mortgagee may bring trespass or trover against one who cuts and carries away timber or afterward converts it to his own use, though under a license from the mortgagor. *Frothingham* v. *McKusick*, 24 Me. 403; *Langdon* v. *Paul*, 22 Vt. 205. But waste will not lie until after forfeiture. *Peterson* v. *Clark*, 15 Johns. 205. In some cases, injury to the security is held to be a necessary element in the case. *Van Pelt* v. *McGraw*, 4 N. Y. 110; *contra*, *Gooding* v. *Shea*, 103 Mass. 360; 4 Am. Rep. 563; *Byrom* v. *Chapin*, 113 Mass. 308. A mortgagee cannot maintain trover for trees cut down by a mortgagor in possession, as the property does not vest in him. *Peterson* v. *Clark*, 15 Johns. 205. No action lies against a mortgagor for permissive waste. *Allison* v. *McCune*, 15 Ohio, 726; *Gardner* v. *Heartt*, 3 Den. 232. A second mortgagee cannot maintain trespass *quare clausum fregit* for an injury to the premises (*Gooding* v. *Shea*, 103 Mass. 360; 4 Am. Rep. 563); unless before action the first mortgage is discharged. *Sanders* v. *Reed*, 12 N. H. 558. In *Hitchman* v. *Walton*, 4 Mees. & W. 409, case was sustained by a mortgagee for a removal of fixtures. It is held not to be necessary to refer to the statute giving the action (*Carris* v. *Ingalls*, 12 Wend. 70; *Robinson* v. *Kinne*, 1 N. Y. (T. & C. 60); and though such reference is made, and to the wrong section, the verdict will be supported. *Achey* v. *Hull*, 7 Mich. 423. The plaintiff need not set out his title with particularity and need only show himself entitled to the immediate estate of inheritance. *Greenly* v. *Hall*, 3 Harr. (Del.) 9. But if he alleges his title as a devise of a remainder in fee, he cannot prove a remainder in fee by descent. *Southerland* v. *Jones*, 6 Jones' (N. C.) L. 321. The action for waste did not survive at common law. *Compere* v. *Hicks*, 7 T. R. 732; *Browne* v. *Blick*, 3 Murph. (N. C.) 511. But in many States this has been changed by statute, and an action is given to the heir or representatives of the reversioner and against the representatives of the tenant. Washb. on Real. Prop., Vol. 1, p. *119; *Rutherford* v. *Aiken*, 3 N. Y (T. & C.) 60.

§ 5. **Injunction.** The more ordinary remedy in case of waste is an injunction against the continuance of the wrong. A bill for an injunction lies in favor of any person interested in the property. *Camp* v. *Bates*, 11 Conn. 51. It is the only remedy where a tenant without impeachment of waste exercises this power in an unreasonable and unconscionable manner. *Kane* v. *Vanderburgh*, 1 Johns. Ch. 11. It is

not a remedy for mere trespass. *Attaquin* v. *Fish*, 5 Mete. (Mass.) 140. The rule laid down in *Georges Creek Co.* v. *Detmold*, 1 Md. Ch. Dec. 371, is that if there is a privity of estate between the party applying for the injunction and him who is doing or threatening to do the acts, such as exists between tenant for life or years and the reversioner, it is not necessary that the act should work irreparable injury to induce the court to grant it. But if the parties are strangers in respect to the estate or are claimants adverse to each other, the court will require evidence that the injury threatened will be irreparable before it will interpose to restrain the acts by injunction. *Atkins* v. *Chilson*, 7 Mete. (Mass.) 398; *Poindexter* v. *Henderson*, Walk. (Miss.) 176. An injunction was granted where the land of an insolvent debtor was attached. *Camp* v. *Bates*, 11 Conn. 51. And in other cases, it is granted pending an action to try the title of land, but not to prevent the ordinary use and cultivation of the property. *Durall* v. *Waters*, 1 Bland (Md.), 569; *Staats* v. *Freeman*, 6 N. J. (2 Halst.) Eq. 490; *Bush* v. *Phillips*, 3 Wend. 428; *Kinsler* v. *Clarke*, 2 Hill's (S. C.) Ch. 617. Where a bill is brought to stay waste and it appears that waste has already been done, it is competent for a court of equity to require an account of the waste to be taken, and to give the party a compensation for the damages. *Watson* v. *Hunter*, 5 Johns. Ch. 170; *Ware* v. *Ware*, 6 N. J. (2 Halst.) Eq. 117. The account granted is only incidental to the right to an injunction against future waste. *Ackerman* v. *Hartley*, 8 N. J. (4 Halts.) Eq. 476; *Higginbotham* v. *Hawkins*, L. R., 7 Ch. 676; 3 Eng. Rep. 568. And if an action at law for such waste would be barred, no account can be taken. The statute runs from the time when the waste is committed, or at least from the time when the tenant who sells timber gets the money. *Higginbotham* v. *Hawkins*, L. R., 7 Ch. 677; 3 Eng. Rep. 568. For further consideration of this topic, see Vol. III, pp. 694–700, *Injunction*, Chap. 80, title II, Art. 1, § 7.

§ 6. **Damages.** The damages which can be recovered will vary as the suit is for the injury to the estate, or for the value of fixtures or timber severed. In many States the reversioner can still recover, in a proper action, treble damages. *Chipman* v. *Emeric*, 3 Cal. 283; *Harder* v. *Harder*, 26 Barb. 409; *Sackett* v. *Sackett*, 8 Pick. (Mass.) 306. On the question of the amount of damages, the relative value of the land, with the wood on, compared with the value with it off, the depreciation of the wood left standing, and the amount of wood land left, are all material. *Harder* v. *Harder*, 26 Barb. 409. In Massachusetts it is held that in case of waste by a mortgagor, the mortgagee is not limited to the injury to his security, but may recover the damage to the estate.

He is entitled to the full benefit of the entire mortgaged estate for the full payment of his entire debt. *Byrom* v. *Chapin*, 113 Mass. 308. If the action is trover for removing timber or fixtures, the title to which vested in the landlord on removal, the damages are the value of the property removed. Where the action is brought for cutting down timber, the plaintiff recovers as damages the amount by which the value of the estate is diminished by its destruction, and not merely the value of the trees. *Achey* v. *Hull*, 7 Mich. 423. The tenant, when sued for cutting timber and selling it, cannot recoup, or make counter-claim for improvements made by him upon the premises at another time. *Morehouse* v. *Cothead*, 22 N. J. (2 Zab.) Law, 521; *Van Syckel* v. *Emery*, 18 N. J. Eq. (2 C. E. Green) 387; *Miller* v. *Shields*, 55 Ind. 71. But in an account decreed in equity against a tenant for waste of timber, he may be allowed in mitigation for firewood and timber furnished by him for the farm from other premises. *Sarles* v. *Sarles*, 3 Sandf. Ch. 601. Where digging turf by sub-tenants, though in itself waste, improved the land, the tenant was not held to account for it. *Harris* v. *Ekins*, 20 W. R. 999. The purchaser of the reversion cannot claim damages for cutting ornamental trees, if there is no injury to the reversion. *Bubb* v. *Yelverton*, 10 L. R. Eq. 465; 40 L. J. Ch. 38. Where trover is brought for timber cut, the damages are its value, though increased by the tenant's labor. *Harris* v. *Goslin*, 3 Harr. (Del.) 340. The plaintiff can only recover for the injury to the particular estate which he holds. *Hamden* v. *Rice*, 24 Conn. 350. The non-joinder of a joint owner may be available in mitigation of damages. *Achey* v. *Hull*, 7 Mich. 423. Where the waste is committed by a stranger, he is not liable to full damages in an action by a tenant, unless the tenant has already been held responsible by the remainderman. *Wood* v. *Griffin*, 46 N. H. 230. In a bill in equity to redeem mortgaged premises, in which proceeding an account has been taken, the mortgagor will not be charged with the treble damages allowed by statute. *Boston Iron Co.* v. *King*, 2 Cush. (Mass.) 400.

§ 7. **Defenses.** The defenses which would go in general denial of the offense indicated in the discussion of what constitutes waste, such would be that trees cut were of a nature that the tenant had a right to cut, or that there was a custom to cut such trees, or that they were reasonable cuttings to clear the land. Other defenses would be in confession and avoidance. The smallness of the damages may be a defense. Thus, the removal of a little more hay and muck than were replaced by the manure returned was held not to be actionable. *Harvey* v. *Harvey*, 41 Vt. 373. Where the waste is a small amount only, the courts in North Carolina will arrest judgment. *Sheppard* v. *Sheppard*, 2 Hayw.

382. And at common law the damage done must exceed three shillings and four pence. *Harrow School* v. *Alderton*, 2 B. & P. 88; *Rigg* v. *Parsons*, cited 2 East, 156. But where the waste is by alterations of the buildings, or other acts which may endanger the title, by destroying identity, the premises may be increased in value, and yet an action lie. *Pindar* v. *Wadsworth*, 2 East, 154. If the tenant repairs what would be held to be waste, before action brought, it is a defense. *Jackson* v. *Andrew*, 18 Johns. 431; *Johnson* v. *Pettit*, 1 Cinc. (Ohio) 25. Evidence of a parol consent by the landlord to the cutting of trees, on condition that the tenant would clear and seed down the land where the trees were cut, is not admissible, such consent being a mere license, and requiring writing to give it validity. *McGregor* v. *Brown*, 10 N. Y. 114; *Wood* v. *Griffin*, 46 N. H. 236. Where the premises set off as dower were leased to the reversioner, and he took possession, it is a waiver of a forfeiture for waste. *Hickman* v. *Irvine*, 3 Dana (Ky.), 121. Improvements made by the tenant will not excuse or justify waste, especially when the benefit is to the tenant only, and may be gone before the expiration of the tenancy. *Van Syckel* v. *Emery*, 18 N. J. (3 C. E. Green) Eq. 387; *Miller* v. *Shields*, 55 Ind. 71. It is no defense that the defendant had disseized the plaintiff (*Achey* v. *Hull*, 7 Mich. 423); nor that the reversioner purchased the estate of the tenant after the waste. *Dupree* v. *Dupree*, 4 Jones' (N. C.) Law, 387. It is no defense to the claim for treble damages that the tenant had good reason to believe the land to be his own. *Robinson* v. *Kinne*, 1 T. & C. (N. Y.) 60. A verdict of guilty as to part is an acquittal as to the rest. *Morehouse* v. *Cotheal*, 22 N. J. (2 Zab.) Law, 521. Where the tenant or mortgagor has settled the damages with some person having the superior right, as a first mortgagee, it will be a defense to an action by any person holding a later title, as a second mortgagee. *Gooding* v. *Shea*, 103 Mass. 360; 4 Am. Rep. 563.

# CHAPTER CXXXVI.

## WATER AND WATER-COURSES.

### ARTICLE I.

#### OF WATER AND WATER-COURSES GENERALLY.

**Section 1. Definition and nature.** A water-course is a stream of water, usually flowing in a definite channel, having a bed and sides or banks, and usually discharging itself into some other stream or body of water. *Luther* v. *Winnisimmet Co.*, 9 Cush. 171; *Gavit* v. *Chambers*, 3 Ohio, 495; *Starr* v. *Child*, 20 Wend. 149; *Eulrich* v. *Richter*, 37 Wis. 226; S. C. affirmed, 41 id. 318; *Barnes* v. *Sabron*, 10 Nev. 217; *Wagner* v. *Long Island R. R. Co.*, 5 Sup. Ct., N. Y. (T. & C.) 163; S. C., 2 Hun, 633. To constitute a water-course, the size of the stream is not important. It may be very small, and the flow of the water need not be constant (Id.; *Shields* v. *Arndt*, 3 Green's Ch. [N. J.] 234; *Gillett* v. *Johnson*, 30 Conn. 180; *Bassett* v. *Salisbury Manuf. Co.*, 43 N. H. 569); but it must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. Water flowing through a hollow or ravine, only in times of rain or melting of snow, is not, in contemplation of law, a water-course. Id.; Ang. on Water-courses, § 4, *d*; *Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Eulrich* v. *Richter*, 41 Wis. 318. But if the face of the country is such as necessarily to collect in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet, and if such water is regularly discharged through a well-defined channel which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural water-course. *Earl* v. *DeHart*, 12 N. J. Eq. 280.

Almost the whole law of water-courses is founded upon the common-law maxim *aqua currit et debet currere ut currere solebat.* Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement for the discharge upon it of all waters which by nature rise in, or

flow ever, or fall upon the superior. *Kauffmnn* v. *Griesemer*, 26 Penn. St. 407; *M'Calmont* v. *Whitaker*, 3 Rawle (Penn.), 84. Hence the owner of a mill has an easement in the land below for the free passage of the water from the mill, in the natural channel of the stream, accompanied with a right to enter upon the land for the purpose of clearing out the stream and removing obstructions to the free flow of the water. *Prescott* v. *Williams*, 5 Metc. 429. But, as seen from the cases cited above, a mere right of drainage over the general surface of land is very different from the right to the flow of a stream or brook across the premises of another. Ang. on Water-courses, § 4. See, also, *Bangor* v. *Lansil*, 51 Me. 521; *Ashley* v. *Wolcott*, 11 Cush. 195. And it is held that to constitute a water-course, in which rights may be acquired by user, the flow of water must possess that unity of character by which the flow on one person's land can be identified with that on his neighbor's land. *Briscoe* v. *Drought*, 11 Ir. C. L. R. 250.

Water-courses, in the sense here intended, are very commonly denominated "rivers" or "rivulets," according to their magnitude. Ang. on Water-courses, § 3.

§ 2. **Of the ownership.** The right to flowing water is now well settled to be a right incident to property in the land. *Elliott* v. *Fitchburg R. R. Co.*, 10 Cush. 193. A stream of water is as much the property of the owner of the soil over which it passes, as the stones scattered over it. *Buckingham* v. *Smith*, 10 Ohio, 288. *Post*, p. 262. See *Browne* v. *Kennedy*, 5 Harr. & Johns. (Md.) 195; *Clark* v. *Conroe*, 38 Vt. 469; *Roath* v. *Driscoll*, 20 Conn. 532; *Newson* v. *Pryor*, 7 Wheat. 7; *Williams* v. *Jackson*, 5 Johns. 489; *Bullen* v. *Runnels*, 2 N. H. 255. So, this right or corporeal hereditament, which is embraced within or appertains to the ownership of the land over and through which a water-course runs, is subject to the same incidents as other interests in real property. It may be conveyed absolutely, or its use may be modified or restricted by grant (*Brace* v. *Yale*, 10 Allen, 443); so, too, it may be lost, or acquired either wholly or in part by an adverse user sufficiently long, exclusive, and notorious, to furnish adequate grounds for the presumption of a grant. Id. And see *Wright* v. *Howard*, 1 Sim. & Stu. 190. It is, however, to be observed, that a grant of a stream of water or water-course, *eo nomine*, will not pass the land over which the water runs (*Jackson* v. *Halsted*, 5 Cow. 216; *Nostrand* v. *Durland*, 21 Barb. 478. See *Beach* v. *Mayor, etc., of New York*, 45 How. [N. Y.] 357, 368; *Egremont* v. *Williams*, 11 Ad. & El. [N. S.] 700); nor will an action lie to recover the possession of water by the name of water only, but it must be brought in respect of

the land which lies at the bottom, and the description of it must be, so much land covered with water. 2 Bl. Com. 18; *Race* v. *Ward*, 4 El. & Bl. 708. Vol. 3, p. 6.

Such little streams as cannot in their natural state be used for the floating of boats, etc., and for the transportation of property, are to be regarded as private property, and not as public highways (*Cates* v. *Wadlington*, 1 McCord [S. C.], 580; *Treat* v. *Lord*, 42 Me. 552); and, although by the application of artificial means, at the expense of the owner, they become boatable and susceptible of public use, yet they do not thereby become the property of the public. *Wadsworth* v. *Smith*, 11 Me. 278.

It is well settled in this country, that a grant by a State conveying a tract of territory carries with it a right of property in all the water-courses within the boundaries of the grant. *Coovert* v. *O'Conner*, 8 Watts, 470; *Middleton* v. *Pritchard*, 4 Ill. 510; *Lunt* v. *Holland*, 14 Mass. 149; *Canal Commissioners* v. *People*, 5 Wend. 423; Ang. on Water-courses, § 4.

§ 3. **Riparian proprietors.** The owners of water-courses are, in law, denominated *riparian* proprietors. *Bardwell* v. *Ames*, 22 Pick. 333, 355. And the difference between a stream running by the side of a man's land, and one which runs through it is, that in the former case he owns but half, and in the latter the whole of the ground covered by the stream. *Starr* v. *Child*, 20 Wend. 149, 154. The land on one side of a stream may be, and most frequently is, owned by one person, and the land on the opposite side by another; and when such is the case, each proprietor owns to the middle, or what is called the *thread* of the river. Vol. I, 711, tit. *Boundaries*. But if the same person be the owner of the lands on both sides of the stream, he owns the whole stream to the extent of the length of his lands upon it. Id.; 3 Kent's Com. 428. And see *Bickett* v. *Morris*, L. R., 1 H. L. Sc. Cas. 47. In ascertaining the thread of the river, it will be proper to take the middle line between the shores upon each side, without regard to the channel, or lowest and deepest part of the stream. And in ascertaining the shores or water-lines on each side, to measure, it will be proper to find what those lines are when the water is in its natural and ordinary stage at a medium height, neither swollen by freshets nor shrunk by drought. *Trustees, etc.* v. *Dickinson*, 9 Cush. 544. And see *Ross* v. *Faust*, 54 Ind. 471; S. C., 23 Am. Rep. 655; Vol. 1, pp. 707–721, tit *Boundaries*.

The same rule applies, whether a grant of land is made by a State or by an individual; and where a State, having title to lands lying on both sides of a water-course not navigable, grants the lands lying on one side thereof, and bounded thereby it is universally admitted, that such

grant carries with it the title to a moiety of the bed of the water-course. *Hayes* v. *Bowman*, 1 Rand. (Va.) 420; *Browne* v. *Kennedy*, 5 Harr. & J. (Md.) 195; *People* v. *Canal Appraisers*, 13 Wend. 355; 17 id. 571. And grants by the general government of the United States are construed by the common-law rule, unless there is something to exclude or qualify that construction. *Middleton* v. *Pritchard*, 5 Ill. 510. Thus, a grant by the United States of land lying upon the river Mississippi, without reservation, was held to pass to the grantee a title to the middle of the stream. Id. See, also, *Morgan* v. *Reading*, 3 Sm. & M. (Miss.) 366; *St. Paul, etc., Railroad Co.* v. *Schurmer*, 7 Wall. 272, 288.

Where land lying on each side of a stream was owned by tenants in common, and they made partition of the same, by assigning the land on one side of the stream to one, and that on the other side to another, it was held that the two tracts were to be considered as separated by the *thread* or central line of the stream. *King* v. *King*, 7 Mass. 496.

§ 4. **When persons become riparian owners.** This branch of the subject involves the rules of law relating to boundaries, as to which, see Vol. 1, pp. 707–721.

§ 5. **Of the right to use the water.** The right of the owner of lands to the continued flow of the water, in its natural channel, is not an easement but a natural right (*Stokoe* v. *Singers*, 8 El. & Bl. 36; *Wadsworth* v. *Tillotson*, 15 Conn. 366; *Tyler* v. *Wilkinson*, 4 Mas. [C. C.] 397); it is an incident of property, as much as the right to have the soil itself in its natural state, unaltered by the acts of a neighboring proprietor, who cannot dig so as to deprive it of the support of his land (*Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 299; *Crittenton* v. *Alger*, 11 Metc. 284; *Hill* v. *Newman*, 5 Cal. 445); and the right can only be extinguished by operation of law, the act of God, or the act of the owner himself. *Mississippi Central R. R. Co.* v. *Mason*, 51 Miss. 234. The general doctrine is, that every person, through whose land a natural water-course runs, has a right, *publici juris*, to the benefit of it as it passes through his land, to all the useful purposes to which it may be applied; and no proprietor of land, on the same water-course, either above or below, has a right unreasonably to divert it from flowing into his premises, or obstruct it in passing from them, or to corrupt or destroy it. It is inseparably annexed to the soil, and passes with it, not as an easement, nor as an appurtenance, but as parcel. Use does not create it; and disuse cannot destroy or suspend it. Unity of possession and title in such land with the lands above or below it does not extinguish or suspend it. SHAW, C. J., in *Johnson* v. *Jordan*, 2 Metc. (Mass.) 239. And see *Wheatley* v. *Baugh*, 25 Penn. St. 528;

*Tourtellot* v. *Phelps*, 4 Gray, 370; *Crossley* v. *Lightowler*, L. R., 3 Eq. 296; *Sampson* v. *Hoddinott*, 1 C. B. (N. S.) 608. But, strictly speaking, the riparian proprietor has no property in the water itself, but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. *Tyler* v. *Wilkinson*, 4 Mas. (C. C.) 400; *Webb* v. *Portland Manuf. Co.*, 3 Sumn. (C. C.) 189; *Mason* v. *Hill*, 5 B. & Ad. 1; S. C., 2 Nev. & M. 747. He has a right to the reasonable use of the water flowing past his land, for his domestic purposes, and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. He also has the right to the use of the water for any other purpose, provided he does not thereby interfere with the rights of other proprietors, either above or below him. *Perkins* v. *Dow*, 1 Root (Conn.), 535; *Blanchard* v. *Baker*, 8 Me. 253; *Miner* v. *Gilmour*, 12 Moore's P. C. C. 131. Subject to this condition, a riparian proprietor may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation; but he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury. Id.; *Bowman* v. *City of New Orleans*, 27 La. Ann. 501. The *water-power* to which the riparian proprietor is entitled, consists in the fall of the stream, when in its natural state, as it passes through his land, or along the boundary of it; or, in other words, it consists of the difference of level between the surface where the stream first touches his land and the surface where it leaves it. *McCalmont* v. *Whittaker*, 3 Rawle (Penn.), 84. See, also, *Brown* v. *Bush*, 45 Penn. St. 66; *Tillotson* v. *Smith*, 32 N. H. 94.

The right to appropriate a stream of water, to the exclusion of any owners of the banks of the stream, cannot be acquired in a less period than twenty years. *Mason* v. *Hill*, 2 Nev. & M. 747; S. C., 5 B. & Ad. 1; *Campbell* v. *Smith*, 8 N. J. Law, 140. A right to the use of water in a particular manner may, however, be acquired by an uninterrupted adverse enjoyment thereof for a period of twenty years. *Townsend* v. *McDonald*, 12 N. Y. (2 Kern.) 381; *Law* v. *McDonald*, 9 Hun (N. Y.), 23; *Pillsbury* v. *Moore*, 44 Me. 154; *White* v. *Chapin*, 12 Allen, 516; *Watkins* v. *Peek*, 13 N. H. 360; *Bucklin* v. *Truell*, 54 id. 122. The entire doctrine as stated by Judge Denio, in *Townsend* v. *McDonald*, 12 N. Y. (2 Kern.) 391, is, that "if one proprietor has, during a period of twenty years or more, possessed and used a portion of the hydraulic property belonging to another proprietor, not by license or favor, but adversely and in derogation of the rights of such

proprietor, the law, upon considerations of policy, and for the purpose of quieting a long possession, will presume a grant from the proprietor thus intruded upon to the other, and will preclude the party who has thus acquiesced from asserting the right which he otherwise would have had." See, also, *Hammond* v. *Zehner*, 23 Barb. 473; S. C. affirmed, 21 N. Y. (7 Smith) 118; *Sargent* v. *Ballard*, 9 Pick. 251. A special right, different from the general one, and paramount to the general rights of other owners of land on the same stream, may be acquired, by an exclusive enjoyment for fifteen years, in Connecticut; and to this end, it is not necessary that such enjoyment should have been *adverse* to the claims of those affected by it. *Ingraham* v. *Hutchinson*, 2 Conn. 584; *Parker* v. *Hotchkiss*, 25 id. 321. The rule is the same in Vermont. *Rogers* v. *Page*, Brayt. (Vt.) 169; *Perrin* v. *Garfield*, 37 Vt. 304, 308. In Pennsylvania the period is *twenty-one* years (*Cooper* v. *Smith*, 9 Serg. & R. 26), in Texas it is *ten* years (*Haas* v. *Choussard*, 17 Tex. 588), and so in Louisiana. *Delahoussaye* v. *Judice*, 13 La. Ann. 587. See Vol. 2, tit. *Easements;* Vol. 4, pp. 744 *et seq.*

§ 6. **Diversion of water.** See Vol. 4, pp. 699, 739. An owner may not use his property absolutely as he pleases, but his dominion is limited by the maxim of the law, "*sic utere tuo ut alienum non lædas.*" In accordance with this maxim it has been invariably held, that, in the absence of a license or grant, the owner of land has no right *to divert* a stream of water flowing through his land from its natural course, to the damage of a land-owner below. See *Sands* v. *Trefusis*, Cro. Car. 573; *Brown* v. *Best*, 1 Wils. 174; *Hart* v. *Evans*, 8 Penn. St. 13; *Newhall* v. *Ireson*, 8 Cush. 595; *Davis* v. *Winslow*, 51 Me. 264, 291; *Porter* v. *Durham*, 74 N. C. 767. And it is held that the wrongful diversion of a stream of water implies some damage, though merely nominal. *Chatfield* v. *Wilson*, 27 Vt. 670. Even the owners of a mill have not the right, when it becomes necessary for the purpose of repairs, to divert the stream upon which it is situated, to the injury of another proprietor upon the same stream below. And if they cannot make their repairs without such injurious *diversion* of the stream, they must obtain the consent of the proprietor below them, for that purpose, or answer him in damages for the injury he sustains. *VanHoesen* v. *Coventry*, 10 Barb. 518. And see *Davis* v. *Getchell*, 50 Me. 602.

A *diversion* of a stream, in what may be called the technical sense of that word. denotes the turning of the stream, or a part of it, as such, from its accustomed direction—its natural course—so that the water thus diverted never reaches the land of the owner below, and therefore

cannot be used by him, as it might have been, were it not for such diversion. *Parker* v. *Griswold*, 17 Conn. 288, 299. The insensible loss of the water, which is necessarily consequent upon the beneficial and proper enjoyment of it, is not a diversion within the technical rule. Id.; *Wadsworth* v. *Tillotson*, 15 id. 366. And see *Ford* v. *Whitlock*, 27 Vt. 265.

If a natural stream of water flows and forms the boundary between the lands of different proprietors, the fee of each owner includes one-half of the bed of the stream; but each is entitled to use one-half of the water which flows in the stream, without regard to the position and course of its principal channel and current. *Pratt* v. *Lamson*, 2 Allen, 275. As expressed by Platt, J., in *Vandenburg* v. *Vanbergen*, 13 Johns. 212, "the grant of an undivided share in a stream of water would not authorize the grantee to appropriate or modify the stream to the injury of others who have a joint interest in it. The property in a stream of water is *indivisible*. The joint proprietors must use it as an entire stream in its natural channel; a severance would destroy the rights of all." See, also, *Webb* v. *Portland Manuf. Co.*, 3 Sumn. (C. C.) 189; *Blanchard* v. *Baker*, 8 Me. 253.

Where a spring rises on one man's land, and from it a stream runs through the land of another, the first cannot divert the stream from its natural channel, although barely sufficient for his own domestic uses and watering his land. *Arnold* v. *Foot*, 12 Wend. 330; *Chatfield* v. *Wilson*, 27 Vt. 670; *Fleming* v. *Davis*, 37 Tex. 173, 197. The plaintiff need not show that he has sustained actual damages in order to sustain his action; the law will imply damage in such a case. Id. But it is held in New York, that an action will not lie for an injury done by the diversion of a water-course, where the premises injured are situated in another State. *Watts* v. *Kinney*, 23 Wend. 484; 6 Hill, 82; *Graves* v. *McKeon*, 2 Denio, 639; 3 id. 610; *Lapham* v. *Rice*, 55 N. Y. (10 Sick.) 472, 477.

§ 7. **Surface water and drainage.** See Vol. 3, pp. 711, 712; Vol. 4, pp. 740 *et seq.* As it respects surface water, the prevailing doctrine in this country appears to be, that, when two fields are adjacent and one is lower than the other, the owner of the upper field has a natural easement to have the water that falls upon his land flow off from the same upon the field below, which is charged with a corresponding servitude. Hence it is held that the owner of the lower field has no right to erect embankments whereby the natural flow of the water from the upper field shall be stopped; nor has the owner of the upper field a right to make any excavations or drains by which the flow of water is diverted from its natural channel and a new channel made on

the lower ground; nor can he collect into one channel waters usually flowing off into his neigbor's fields by several channels, and thus increase the rush upon the lower fields. This is the doctrine of the civil law. See *Lattimore* v. *Davis*, 14 La. 161; *Bowman* v. *City of New Orleans*, 27 La. Ann. 501. And it has been adopted by the courts in many of the States. *Martin* v. *Riddle*, 26 Penn. St. 415; *Ogburn* v. *Connor*, 46 Cal. 346; S. C. 13 Am. Rep. 213; *Porter* v. *Durham*, 74 N. C. 767; *Butler* v. *Peck*, 16 Ohio St. 334. But, in other States, the doctrine of the common law prevails; and it is held, in accordance with this doctrine, that the obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom, against one who does no act inconsistent with the due exercise of dominion over his own soil. A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction and in larger quantities than previously. If such an act causes damages to adjacent land, it is *damnum absque injuria*. *Wheeler* v. *Worcester*, 10 Allen, 591. See, also, *Dickinson* v. *Worcester*, 7 id. 19; *Rawstron* v. *Taylor*, 11 Exch. 369; *Buffum* v. *Harris*, 5 R. I. 243. There is said to be no principle of law which will prevent the owner of land from filling up the wet and marshy places on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface. Denio, C. J., in *Goodale* v. *Tuttle*, 29 N. Y. (2 Tiff.) 459. And see *Wagner* v. *Long Island R. R. Co.*, 2 Hun (N. Y.), 633; S. C., 5 Sup. Ct. (T. & C.) 163.

§ 8. **Subterranean diversion.** Subterraneous currents of water are not subject to the same rules of law in respect to the rights of parties to their undisturbed flow, as streams above the surface. In the absence of a right specially acquired, the owner of the soil through which such a currrent passes has no such property in it that he can maintain an action for its diversion or disturbance. *Brown* v. *Illius*, 27 Conn. 84; *Johnstown Cheese Manuf. Co.* v. *Veghte*, 69 N. Y. (24 Sick.) 16. Thus, one who digs a well on his own land in good faith to obtain water for his domestic uses is not liable for the consequent diversion of unknown subterranean percolations or currents from the spring of an adjoining owner. *Chase* v. *Silverstone*, 62 Me. 175; S. C., 16 Am. Rep. 419. And a land-owner may drain, mine, or quarry, though in so doing he interferes with the flow of water in hidden, unknown, underground channels. *Acton* v. *Blundell*, 12 M. & W. 324;

*Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Hodgkinson* v. *Ennor*, 4 B. & S. 229; *Popplewell* v. *Hodgkinson*, L. R., 4 Exch. 248, 251; *Clark* v. *Conroe*, 38 Vt. 469; *Ellis* v. *Duncan*, 21 Barb. 230; *Hanson* v. *McCue*, 42 Cal. 303; 10 Am. Rep. 299; *Frazier* v. *Brown*, 12 Ohio St. 294. See *Swett* v. *Cutts*, 50 N. H. 439; S. C., 9 Am. Rep. 276. But it is otherwise as it respects a known, and well-defined subterranean channel (*Taylor* v. *Welch*, 6 Oreg. 198), and a land-owner may not negligently or maliciously divert even an unknown subterranean stream, to the damage of an adjoining proprietor. *Haldeman* v. *Bruckhart*, 45 Penn. St. 514. See Vol. 4, p. 739.

The doctrine of prescription, or presumption of a grant from lapse of time, can have no application to the case of underground waters percolating through the earth (*Wheatley* v. *Baugh*, 25 Penn. St. 528; *Greenleaf* v. *Francis*, 18 Pick. 117, 122); as to underground percolations, no rights are gained, because nobody knows any thing about them. *Smith* v. *Kenrick*, 7 C. B. 515, 546. And see *Roath* v. *Driscoll*, 20 Conn. 533, 541.

§ 9. **Easement of drip.** The servitude of drip is that by which one man engages to permit the waters flowing from the roof of his neighbor's house to fall on his estate. 3 Kent's Com. 436. And see *Thomas* v. *Thomas*, 2 Cr. M. & R. 34. Where a party builds a house on the line of his lot, with eaves projecting over the adjoining lot, so as to throw thereon the water from the roof, it is a manifest encroachment upon, and appropriation of such lot, to the extent, at least, of the projection; and twenty years' acquiescence, by the owner of the adjacent lot, in this encroachment, is sufficient to lay the foundation for presuming a grant of the right so to use it. *Cherry* v. *Stein*, 11 Md. 1. And see *Smith* v. *Smith*, 110 Mass. 302; *Carbrey* v. *Willis*, 7 Allen, 364, 370; *Tucker* v. *Newman*, 11 Ad. & El. 40. Acquiescence in what would be a nuisance, unless done by permission, will, in law, raise a presumption of a grant. *Norton* v. *Volentine*, 14 Vt. 239, 246.

But it was said that the flow of water for twenty years from the eaves of a house could not give a right to the neighbor to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. *Wood* v. *Waud*, 3 Exch. 748, 778.

§ 10. **Obstructing and detaining water.** It is as illegal to *detain* the water of a running stream unreasonably, as it is to *divert* it. But it may be considered as well settled that in the use of a stream for domestic, agricultural, and manufacturing purposes, to which every riparian owner is entitled, there may of right be some diminution, retardation, or acceleration of the natural current, that is perfectly consistent with the common right, and which is necessarily implied in the right to use

it at all. *Tyler* v. *Wilkinson*, 4 Mas. (C. C.) 397, 401; *Parker* v. *Hotchkiss*, 25 Conn. 321; *Davis* v. *Getchell*, 50 Me. 602; *Embrey* v. *Owen*, 6 Exch. 352. Such owner may even abstract and consume a portion of the water, for domestic purposes, for watering his cattle, and in some cases for irrigating his land, taking care not to interfere materially with a similar right in his neighbor. Id. So, where the nature of the stream requires it, he may detain the water by his dam, to enable him to apply it usefully to manufacturing purposes, and then discharge it in the working of his mills, in quantities greater than the natural flow of the stream; but such use must be reasonable, and so as not to cause material injury or annoyance to his neighbor. *Hayes* v. *Waldron*, 44 N. H. 580; *Merritt* v. *Brinkerhoff*, 17 Johns. 306. What is a *reasonable* use must depend upon a variety of conditions, such as the size and character of the stream, and the uses to which it can be or is applied. See *Honsee* v. *Hammond*, 39 Barb. 89, 95; *Gillett* v. *Johnson*, 30 Conn. 180; *Tourtellot* v. *Phelps*, 4 Gray, 370, 375. And it is generally a question for the jury to decide. *Hayes* v. *Waldron*, 44 N. H. 580; *Miller* v. *Miller*, 9 Penn. St. 74; *Snow* v. *Parsons*, 28 Vt. 459. The detention of water by a dam, for the benefit of a mill, oftentimes results in an injury to the owners of the privilege below. It does not, however, follow that for every such injury there is a remedy. If the detention is indispensable to the owner's reasonable enjoyment of his rights in the common highway, and is continued no longer than is necessary for that purpose, the proprietor below is without remedy for any injury he may have suffered thereby; otherwise, the right of common use is nugatory, and the party requiring such use is himself obstructed in its exercise. *Davis* v. *Winslow*, 51 Me. 264, 290. See, also, *Webb* v. *Portland Manuf. Co.*, 3 Sumn. (C. C.) 189; *Chandler* v. *Howland*, 7 Gray, 348, 350; *Hartzall* v. *Sill*, 12 Penn. St. 248. See Vol. 4, p. 700. To retain the water by a dam for the purposes of a fish pond, constantly maintained, and therefore allowing the natural flow of the water to pass unimpeded to the plaintiff's mill, is held to be a just and reasonable exercise of the defendant's right to use the water as it passes through his land. In the absence of any grant, prescription, or contract, the plaintiffs have no legal right to use the defendant's land as a reservoir, except so far as the erection of their mill-dam may necessarily cause the water to flow back upon it; and the right to cause it thus to flow cannot restrain the defendant from making a reasonable use of the water on his own land, provided he returns it all to its natural channel when it leaves his land, and allows it to flow thence regularly to the plaintiff's land below. *Wood* v. *Edes*, 2 Allen, 579. And see *City of Springfield* v. *Harris*, 4 id. 494.

But where a mill-owner kept his water-gates closed through several

of the working hours of each day, thereby depriving the owners of a factory on the stream below of the use of the water for that time, and then let it off in such unusual quantity that the latter could only use a small portion of it while passing, it was held that such use of the water was clearly *unreasonable* and unlawful, and that it was a proper case for a perpetual injunction. *Pollitt* v. *Long*, 58 Barb. 20. But see S. C. again, 3 N. Y. Sup. Ct. (T. & C.) 232; 56 N. Y. (11 Sick.) 200; *Bullard* v. *Saratoga Victory Manuf. Co.*, 13 Hun (N. Y.), 43. And where the owner of an upper site on a water-course has obstructed the flowing of the water as accustomed to flow, to the injury of an owner below, it is no defense to an action for the obstruction, that the latter has altered his works, so as to require more water than was previously needed, and by this means alone the obstruction became more injurious to him. *Johnson* v. *Lewis*, 13 Conn. 303.

After an artificial vent has been substituted for the natural channel of a water-course, it is the duty of the party who obstructed the natural channel to keep the artificial vent in repair. *Brisbane* v. *O'Neall*, 3 Strobh. (S. C.) 348. And it is held that exemplary damages may be awarded against a person for maliciously stopping a water-course. *Walker* v. *Butz*, 1 Yeates (Penn.), 574.

§ 11. **Right of irrigation.** The English cases have not yet allowed of the use of water for irrigation, unless the right so to use it can be successfully claimed on the ground of grant or prescription. *Chasemore* v. *Richards*, 7 H. L. Cas. 349; S. C., 5 H. & N. 982. And see Vol. 4, pp. 699, 700. But that a portion of the water of a stream may be used for the purpose of irrigating land, as one of the rights of the proprietors of the soil along or through which it passes, may be regarded as well established in this country. *Gillett* v. *Johnson*, 30 Conn. 180; *Weston* v. *Alden*, 8 Mass. 136; *Davis* v. *Getchell*, 50 Me. 602, 604; *Fleming* v. *Davis*, 37 Tex. 173. Yet, a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly abstract or divert the water-course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it, if not diverted or used unreasonably. Id.; *Elliot* v. *Fitchburg R. R. Co.*, 10 Cush. 191, 194; *Arnold* v. *Foot*, 12 Wend. 330. The doctrine is thus stated by the supreme court of Illinois: An individual owning a spring on his land, from which water flows in a current through his neighbor's land, would have the right to use the whole of it, if necessary to satisfy his *natural* wants. He may consume all the water for his domestic purposes, including water for his stock. If he desires to use it for *irrigation* or manufac-

tures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor. Where the stream is small and does not supply water more than sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the water for either *irrigation* or manufactures. *Evans* v. *Merriweather*, 4 Ill. 492. And see *Bliss* v. *Kennedy*, 43 id. 67; *Miller* v. *Miller*, 9 Penn. St. 64. See *ante*, p. 263, § 6.

§ 12. **Prior occupation.** A question has been on several occasions discussed, whether a title to the use of running water is acquired by mere *occupancy*, so as to authorize any diversion of it from its accustomed course, or any obstruction or detention of it. And it has been contended, that the application of the water of a stream to some particular and useful purpose is an appropriation of it, which gives the right to the perpetual use of it in the same way, against all persons who may not have previously applied it to some other use inconsistent therewith. In other words, that running water is *publici juris*, and that the first use of it gives the better title to it. See 2 Bl. Com. 402; *Liggins* v. *Inge*, 7 Bing. 692; *Williams* v. *Morland*, 2 B. & C. 913; *Elliot* v. *Fitchburg R. R. Co.*, 10 Cush. 191, 193; *Smith* v. *O'Hara*, 43 Cal. 371. But the better doctrine undoubtedly is, that mere priority of appropriation of the water of a stream confers no exclusive right to the use of it. *Roath* v. *Driscoll*, 20 Conn. 532, 541; *Heath* v. *Williams*, 25 Me. 209. Thus it appears to be well settled in England that no appropriation of running water, except for such a period as will confer an easement, can diminish the natural rights of other parties possessing lands along the course of the stream. *Mason* v. *Hill*, 5 B. & Ad. 1; *Wright* v. *Howard*, 1 Sim. & Stu. 190; *Embrey* v. *Owen*, 6 Exch. 353. And in this country, it is laid down as the law that the right to have a stream flow on in its accustomed course is one which can only be interfered with by an easement acquired by grant, or by an adverse enjoyment for the period of time limited by the statute of limitations for entry upon land; and that mere priority of occupation of running water, without such consent or grant, confers no exclusive right. *Tyler* v. *Wilkinson*, 4 Mas. (C. C.) 397; *Whipple* v. *Cumberland Manuf. Co.*, 2 Story, 661; *Pugh* v. *Wheeler*, 2 Dev. & Bat. (N. C.) Law, 50; *Cowle* v. *Kidder*, 24 N. H. 364; *Davis* v. *Fuller*, 12 Vt. 178. See *Strickler* v. *Todd*, 10 Serg. & R. 63.

But the position that the first occupant of running water for a beneficial purpose has a good title to it is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as

in other cases of injuries to real property, possession is a good title against a wrong-doer; and the owner of the land who applies the stream that runs through it, to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill. *Mason* v. *Hill*, 5 B. & Ad. 1. See, also, *Cary* v. *Daniels*, 8 Mete. 466; *Gould* v. *Boston Duck Co.*, 13 Gray, 442; *Pratt* v. *Lamson*, 2 Allen, 275, 288.

The anomalous condition of the settlers and miners upon the public land in California has induced the courts of that State to depart from the strict rules of the common law, and to recognize priority of appropriation as a foundation of right to the use of running water. The right to land in that State, resting as it did for years upon no other titles but that of prior occupation and appropriation, the right to the use of running water was also acquired in the same way. So the doctrine is well settled in California, that as between persons claiming water, merely by the appropriation of the water itself, he has the best right who is first in time (*Butte Canal, etc., Co.* v. *Vaughn*, 11 Cal. 143, 152; *Smith* v. *O'Hara*, 43 id. 371. See, also, *Lobdell* v. *Simpson*, 2 Nev. 274. In *Rupley* v. *Welch*, 23 Cal. 452, it was held that a court of equity will enjoin miners from disturbing, or diverting the water from, a reservoir in a ravine, which had been built for the purpose of irrigating the garden of the plaintiff. And see *Natoma, etc., Co.* v. *McCoy*, 23 id. 490; *Phœnix, etc., Co.* v. *Fletcher*, id. 481. So, if a ditch for the conveyance of water for sale in the mining regions receives its supply of water from a stream at its head in the mountains, and extends a number of miles down, the water flowing through it the whole distance, and the title of the owner to the upper half or section of the ditch afterward passes to one person, and the title to the lower half to another, the person who acquires the upper half is entitled the exclusive use of the water from the stream at the head of the ditch. *Reynolds* v. *Hosmer*, 51 Cal. 205.

§ 13. **Corruption or pollution of water.** See Vol. 4, pp. 671 *et seq.* The right of every owner of land, through which a stream of water flows, to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion, or corruption, extends as well to the *quality* as to the quantity of the water; if, therefore, an adjoining proprietor corrupts the water, an action upon the case lies for the injury. *Wood* v. *Waud*, 3 Exch. 748; *Crossley* v. *Lightowler*, L. R., 3 Eq. 279; L. R., 2 Ch. App. 478; *Holsman* v. *Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Seaman* v. *Lee*, 10 Hun (N. Y.), 607. Erecting a cesspool near a well, thereby contaminating the water, was held to be actionable. *Norton*

v. *Scholefield*, 9 M. & W. 565. See, also, *Cull* v. *Buttrick*, 4 Cush. 345; *Woodward* v. *Aborn*, 35 Me. 271. So the erection of a tan-yard in the upper part of a stream of water, which poisons, corrupts, or renders it offensive and unwholesome, is actionable. *Howell* v. *McCoy*, 3 Rawle, 256. It has long since been adjudged, that he, who has a fishery, may maintain an action against a person for erecting a dye-house (Co. Litt. 200 b; *Bealy* v. *Shaw*, 6 East, 208; *Stockport Waterworks* v. *Potter*, 7 H. & N. 160. See, also, *Seaman* v. *Lee*, 10 Hun [N. Y.], 607); and if a glover sets up a lime-pit, for calf and sheep-skins, so near a water-course that the lime-pit corrupts it, an action lies. Year-Book, Hen. 2, b. 6; Ang. on Water-courses, § 136. And where the owners of a tannery situated upon a stream threw tan-bark and other materials into the stream, thereby clogging the same and causing damage to the mills of the plaintiff situated lower down the stream, it was held that an action would lie for the injury, even though the damage was done by the defendant without any intent to injure, and in the usual manner in which water is used in tanneries (*Honsee* v. *Hammond*, 39 Barb. 89); and so where the owner of a flax mill upon a natural stream threw flax shives and refuse matter into the stream which impaired the use of the plaintiff's pond and grist mill, it was held actionable. *O'Riley* v. *McChesney*, 3 Lans. 278; 49 N. Y. (4 Sick) 672. It has however been held, that a mill-owner has the right, in a reasonable manner, to discharge the waste from his mill, such as sawdust, shavings, etc., into the stream in the ordinary course of using such mill. *Jacobs* v. *Allard*, 42 Vt. 303; S. C., 1 Am. Rep. 331. Whether the use of a stream to carry off the mill-owner's waste is reasonable or not, is a question of fact for the jury, depending upon the circumstances of the particular case, such as the size and character of the stream, and for what purpose it is used, the extent of the pollution, the benefit to the manufacturer, and the injury to the other riparian owners. *Hayes* v. *Waldron*, 44 N. H. 580; *Snow* v. *Parsons*, 28 Vt. 459; *Prentice* v. *Geiger*, 9 Hun (N. Y.), 350.

A riparian proprietor has no right to use the water in such a manner as to corrupt the atmosphere. A water-course, whether called by the name of sewer or brook, cannot be allowed to remain in such a state as to be a nuisance to the neighborhood, or to be covered over and turned into a sewer so as to take away from the occupiers of adjoining lands any rights they may have to use it as a water-course. *Attorney-General* v. *Hackney Board of Works*, L. R., 20 Eq. 626; S. C., 15 Eng. R. 520. And where one builds a mill-dam and thereby causes disease and sickness, he must respond to the injured persons in an action on the case for a nuisance. And it is no defense in such a case that the injury

affects the whole neighborhood; nor is the civil action barred by an indictment for the same offense. *Story* v. *Hammond*, 4 Ohio, 376. See, also, *People* v. *Townsend*, 3 Hill, 479.

A right to foul or corrupt the water of a stream may be acquired by an adverse user for twenty years. *Moore* v. *Webb*, 1 C. B. (N. S.) 673; *Murgatroyd* v. *Robinson*, 7 El. & Bl. 391; *Merrifield* v. *Lombard*, 13 Allen, 16. And see *Jones* v. *Crow*, 32 Penn. St. 398. And the mere suspension of a prescriptive right to foul a stream is not sufficient to destroy the right, without some evidence of an intention to abandon it (*Crossley* v. *Lightowler*, L. R., 3 Eq. Cas. 279; L. R., 2 Ch. App. 478); but actual disuse of the easement for twenty years, during which time others have acquired adverse rights, destroys the right to the easement. Id. Thus where, through an artificial water-course made for the purpose of draining mines, the drainage water has flowed for twenty years in a pure state, in consequence of the working of the mines having been discontinued, over premises of a person who has used it for that period, the working of the mines cannot be resumed, so as to foul the water and disturb the enjoyment. *Magor* v. *Chadwick*, 11 Ad. & El. 571; S. C., 3 P. & D. 367. See *Rawstron* v. *Taylor*, 11 Exch. 369, 380. So, where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people. *Crossley* v. *Lightowler*, L. R., 3 Eq. Cas. 279; S. C., L. R., 2 Ch. App. 478. But it is held that a mere change in the character of a material used in a particular manufacture does not render liable the manufacturer who has acquired a prescriptive right to foul a stream in the business of that manufacture, but who has not by such change increased the amount of pollution. *Baxendale* v. *McMurray*, L. R., 2 Ch. App. 790; Ang. on Water-courses, § 136. See Vol. 4, pp. 761 *et seq.*

Where a person has a right to the use of an ancient stream of water flowing through his land, and sewage matter is so precipitated into it as to pollute it, he may apply to a court of equity for an injunction to restrain the pollution before it has become an undoubted nuisance; and it is not competent to the persons causing the nuisance to claim as against him a prescriptive right to discharge the sewage into the stream. *Goldsmid* v. *Tunbridge Wells, etc., Commissioners*, L. R., 1 Eq. 161; S. C. affirmed, L. R., 1 Ch. App. 349.

In an action for disturbing the plaintiff in the use of a well, by putting rubbish into it, he will be entitled to recover, if, by means of the rubbish, the water has become shallowed, and the well rendered less convenient for use; but if the effect only was to make the water tem-

porarily muddy, that is too minute a damage to support the action. *Taylor* v. *Bennett*, 7 C. & P. 329.

§ 14. **Overflowing land above.** It is a well-settled doctrine under the common law, that a mill owner or other riparian proprietor has no authority to erect and maintain his dam, in such manner as to flow the lands of proprietors above his mill, on the same stream. Such a structure by which the land of another person is overflowed will be a nuisance (*Great Falls Co.* v. *Worster*, 15 N. H. 412; *Strout* v. *Millbridge Co.*, 45 Me. 76, 87; *Pixley* v. *Clark*, 35 N. Y. [8 Tiff.] 520; *Hutchinson* v. *Granger*, 13 Vt. 386); and an action will in all cases lie for overflowing land as enjoined by the maxim, *sic utere tuo ut alienum non lædas.* Id.; *Bell* v. *McClintock*, 9 Watts, 119. Even if one tenant in common of a water-course upon which a mill is situated erects a dam below on the same water-course, upon his several estate, and thereby flows the common property to the injury of his co-tenant, the latter may maintain an action against him. *Odiorne* v. *Lyford*, 9 N. H. 502; *Pillsbury* v. *Moore*, 44 Me. 154. So, where the proprietor of a mill, and of a definite proportion of the water power or flow of water in a stream, makes a change in a sluiceway which occasions an increase of backwater, injurious to the mill of a neighboring owner who is also part owner of the water power, the latter may maintain an action therefor. *Munroe* v. *Gates*, 48 Me. 463. It is likewise held that if by raising the water in a natural stream above its natural banks, and to prevent its overflow, artificial embankments are constructed which answer the purpose perfectly, yet if, by the pressure of the water upon the natural banks of the stream, percolation takes place so as to drown the adjoining lands of another, an action will lie for the damage caused thereby. It matters not whether the damage is caused by the overflow of, or the percolation through the natural banks so long as the result is caused by an improper interference with the natural flow of the stream. *Pixley* v. *Clark*, 35 N. Y. (8 Tiff.) 520. And it was held that where a canal company have the power under their charter to enlarge their canal, if by means of the enlargement, the lands of an individual are inundated even though the work may have been performed with all reasonable care and skill, it is a legal injury for which the owner is entitled to redress by action. *Selden* v. *Delaware, etc., Canal Co.*, 24 Barb. 362. See, also, *Amoskeag Manuf. Co.* v. *Goodale*, 46 N. H. 53. But see *Bellinger* v. *New York, etc., R. R. Co.*, 23 N. Y. (9 Smith) 42.

A mill-owner, who partially obstructs the flow of water in a stream from his own mill, is not thereby prevented from maintaining an action against another mill-owner, lower down the same stream, for the

injury caused by an additional obstruction in consequence of the latter maintaining his dam at too great a height, whereby the water is set back; and the doctrine of contributory negligence does not apply. *Brown* v. *Dean*, 123 Mass. 254.

The owner of a dam, although erected on his own land, is answerable to his neighbor for an injury to his land in times of ordinary freshets, occasioned or enhanced by the dam. *Bell* v. *McClintock*, 9 Watts, 119. In erecting his dam the owner is bound to regard his neighbor's rights and security, not only in ordinary stages of water, but in those stages occasioned by ordinarily recurring freshets. If, by his dam, he aggravates the injury of an ordinary freshet, he will be responsible. He ought to provide against this in erecting his dam; if he cannot, then it is a case in which he must procure a license from his neighbor to meet the exigency, or not erect it at all. *Casebeer* v. *Mowry*, 55 Penn. St. 419.

And a riparian owner, whose lands are directly inundated by the acts of his neighbor, cannot only by the common law recover adequate damages, but he is allowed by the same authority to defend his land against encroachments, and if any consequences detrimental to the wrong-doer result from this course, they afford no legal ground of complaint. *Merritt* v. *Parker*, Coxe (N. J.), 460; *Adams* v. *Barney*, 25 Vt. 225; Ang. on Water-courses, § 332. And see *Amick* v. *Tharp*, 13 Gratt. 564; *Hooksett* v. *Amoskeag Manuf. Co.*, 44 N. H. 105, 110.

It is well settled at the common law, that a man acquires no right to throw the water back upon the land of another, by merely being the first to make use of the water. See *ante*, p. 269, § 12. But one man may acquire this right by grant, and long usage may be evidence of such a grant. *Gilman* v. *Tilton*, 5 N. H. 231; *Cowles* v. *Kidder*, 24 id. 364. And in some of the States, statutes have been enacted giving to mill-owners the right to flow the adjoining lands if necessary to the working of their mills, subject only to such damages as shall be ascertained by the particular process described. See *Fuller* v. *Chickopee Manuf. Co.*, 16 Gray, 46; *Johns* v. *Stevens*, 3 Vt. 308.

§ 15. **Flooding land below.** It is a well-settled rule of law, that it is equally actionable for a riparian owner vehemently to discharge a superabundance of water below him, as it is to overflow land above, or by the side of him. Thus, a mill-owner has no right to erect machinery, requiring for its propulsion more water than the stream furnishes at its ordinary stages, and operate such machinery by accumulating the water and discharging it upon those below in unusual quantities to their prejudice. *Merritt* v. *Brinkerhoff*, 17 Johns. 306; *Tillotson* v. *Smith*, 32 N. H. 90; *Davis* v. *Getchell*, 50 Me. 602. And if a mill-

owner cause the water upon a stream to be accumulated during the wet season, and draw it off in the summer so as to cause a greater flow than usual, by means of which the banks of the proprietor below are washed away, his land drowned, and his grass depreciated, an action will lie against him for the damages caused thereby (*Gerrish* v. *New Market Manuf. Co.*, 30 N. H. 478); and it is no impediment to the maintenance of such action that the damage done is small. Id.

A party has, however, a right to erect a dam across a stream upon his land, and such machinery as the stream, in its ordinary stages, is adequate to propel, and it is held, that if the stream, in seasons of drought, becomes inadequate for that purpose, he has the right to detain the water for such reasonable time as may be necessary to raise the requisite head, and accumulate such a quantity as will enable him to use the water for the purpose of his machinery. *Clinton* v. *Myers*, 46 N. Y. (1 Sick.) 511; S. C., 7 Am. Rep. 373; *Bullard* v. *Saratoga Victory Manuf. Co.*, 13 Hun (N. Y.), 43; *Gould* v. *Boston Duck Co.*, 13 Gray, 442. By so doing the party is not liable to an action by an owner below, whose machinery does not require for its operations all the water at an ordinary stage, but only such as naturally flows during seasons of drought, though to some extent injured by being deprived of the natural flow. Id. See *Phillips* v. *Sherman*, 64 Me. 171.

The owner of land, which is being inundated by a stream breaking away from its channel, may legally turn it back to its own channel. But he would have no right, in preventing the inundation of his own land, to cause it to flow on to the land of another, except into its old channel. *Tuthill* v. *Scott*, 43 Vt. 525; S. C., 5 Am. Rep. 301.

§ 16. **Backwater.** The common law affords the owner of land a protection against the flow of water back upon his own land to the injury of his mill by the acts of another, without showing any priority of appropriation, or statute provision to aid him. *Heath* v. *Williams*, 25 Me. 209; *Hill* v. *Ward*, 2 Gilm. (Ill.) 285. There can be no difference, it is said, whether the damage to the owner of a mill arise from the water above being diverted from his mill, or from the water below being stopped so as to flow back and thereby prevent the mill from grinding. *Hodges* v. *Raymond*, 9 Mass. 316. Any impediment in the stream caused by the defendant's dam, by which the plaintiff's mill is stopped from grinding, in any state of the water, or made to grind slower, or worse than it otherwise would, is an injury for which the plaintiff would be entitled to damages. *Butz* v. *Ihrie*, 1 Rawle (Penn.), 218. See, also, *Graver* v. *Sholl*, 42 Penn. St. 58; *Shreve* v. *Voorhees*, 2 Green's (N. J.) Ch. 25; *Norway Plains Co.* v. *Bradley*, 52 N. H. 86. And in a New Hampshire case, where the proprietor of

land and a mill privilege erected a dam across the stream upon his own land, and thereby caused the stream to become obstructed with ice, and the water of the stream to be thrown back upon the land and mills of a proprietor above on the same stream, and the operation of the mills was thereby obstructed, it was held that the proprietor below was liable for the damage occasioned by the obstruction. *Cowles* v. *Kidder*, 24 N. H. 364. It was, however, held in Massachusetts, that the owner of land lying upon both sides of a natural stream of water, not navigable, may lawfully erect thereon a dam across the stream to such a height that in ordinary stages of the water it will not throw water back upon the wheels of an ancient mill above, although, in consequence of the erection of the dam, the ice, when it breaks up in the spring, becomes packed together above the dam and the water is thereby set back so as to flood the wheels to a greater height and for a longer time than it has done before at that season. *Smith* v. *Agawam Canal Co.*, 2 Allen, 355.

Where a person has had the use of water, at a given height, for twenty years, a grant will be presumed of the privilege of using it at that height, but nothing more; and if he repairs his dam which has kept the water at that height, so as to raise the water still higher and flow it back upon his neighbor's mill, an action lies, although the dam itself remains at its ancient height. The question is not upon the height of the dam, but of the water. *Stiles* v. *Hooker*, 7 Cow. 266. See *Cowell* v. *Thayer*, 5 Mete. (Mass.) 253; *Olney Mills, etc., Co.* v. *Meese*, 54 Ga. 459.

§ 17. **Escape of water, causing injury.** One who stores water on his own land, and uses all reasonable care to keep it safely there, is not liable for damage effected by an escape of the water, if the escape is caused by the act of God, or *vis major;* as, for example, by an extraordinary rain-fall which could not reasonably have been anticipated, although, if it had been anticipated, the effect might have been prevented. Thus, on the defendant's land were artificial pools, containing large quantities of water. These pools had been formed by damming up with artificial embankments a natural stream which rose above the defendant's land and flowed through it, and which was allowed to escape from the pools successively by weirs into its original course. An extraordinary rain-fall caused the stream and the water in the pools to swell so that the artificial embankments were carried away by the pressure, and the water in the pools, being thus suddenly loosed, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the construction or maintenance of the works, that the rainfall

was most excessive and amounted to *vis major*, and it was held that the action was not maintainable. *Nichols* v. *Marsland*, L. R., 10 Exch. 255; S. C., 14 Eng. Rep. 538; S. C. affirmed, L. R., 2 Exch. Div. 1. See Vol. 4, pp. 438, 732.

So, it is held that a water company, having observed the directions of the statute in laying down their pipes, is not responsible for an escape of water from them not caused by their own negligence. And the fact that their precautions proved insufficient against the effects of a winter of extreme coldness, such as no man could have foreseen, is not sufficient to render them liable for negligence. *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 781. The company is, however, bound to take reasonable care to provide against the consequences of *ordinary* frost. *Steggles* v. *New River Co.*, 11 W. R. 234; S. C. affirmed, 13 id. 413.

The owner of an artificial ditch is held liable for damages caused to cultivated land by the discharge thereon of the waters of the ditch during a great flood, if they would not have been caused but for his negligence in cutting the embankment of the ditch, in order to protect it at the place of discharge, when he might have cut it at such places that no injury would have resulted to any one. *Turner* v. *Tuolumne, etc., Co.*, 25 Cal. 397. And see *Richardson* v. *Kier*, 34 id. 63; *Polack* v. *Pioche*, 35 id. 416. So, an action will lie for the recovery of damages caused by the accumulation of rain water in an open cellar, and its percolation through the earth into the plaintiff's cellar on an adjoining lot; and the fact that the cellar was dug and left open by a former proprietor of both lots, and has been suffered by the defendant simply to remain in the condition it was when he purchased the lot, is not a defense to the action. *Crommelin* v. *Coxe*, 30 Ala. 318.

But the owner of a water-ditch is bound to use no greater care to avoid injury therefrom to the adjoining lands, than a prudent man would employ under similar circumstances, if he were their owner. *Campbell* v. *Bear River, etc., Co.* 35 Cal. 679. And where one properly opens a covered drain upon his own land, which it becomes his duty to close again in order to prevent the water from setting back and overflowing the adjoining land, he is bound to use ordinary care and prudence in closing such drain, and if he does so, he is not responsible for any damage to his neighbor's land, caused by the sudden overflow of such drain. *Rockwood* v. *Wilson*, 11 Cush. 221.

But a railway company, charged with the duty of repairing a drain, was held responsible for the injury arising from the banks of the drain giving way at a period of extraordinary rainfall, which swelled the drain in consequence of the outlet not being sufficiently widened by

other parties whose duty it was to keep the outlet of a certain width. *Harrison* v. *Great Northern Railway Co.*, 3 Hurl. & Colt. 231; S. C., 12 W. R. 1081. And where, by means of a trench, the water from a spring, uncovered by a railway company in building their road, with surface drainage added thereto, was so conducted as to flow upon another's land, the company was held liable in damages, although such flowage was occasioned only when the spring was swollen by rains and melted snow, and the surface drainage increased by the same causes was added thereto; and although the water in the trench was not discharged upon the land in a stream from the outlet, but was poured through the loose earth of the railway embankment. *Curtis* v. *Eastern R. R. Co.*, 98 Mass. 428.

Where the natural outlet to a pond becomes so obstructed as to raise the pond, even if one whose lands are thereby flowed may remove the obstructions, yet he cannot cut a new drain, so as to prevent the flow of water through the old outlet. The owners on that outlet have a right to have the water flow through it. *Mohr* v. *Gault*, 10 Wis. 513. And where A changed the channel of a drain by which change the water was made to flow on the land of B, it was held that this did not justify B in so obstructing the course of the water as to cause it to flow on the land of C. *Amick* v. *Tharp*, 13 Gratt. (Va.) 564. So, where A granted a license to B to flow water from B's land by a ditch through A's land, it was held that this license gave B no right to increase the quantity of water so flowed, either by clearing more land or by cutting more ditches, or enlarging those already dug; neither had B a right to turn a part of the water through another person's land, and then turn a new stream through A's land. *Carter* v. *Page*, 8 Ired. (N. C.) Law, 190.

Where the owner of land through which there is a ditch, whether natural or artificial, which answers as a drain for the upper part of the tract, sells the upper part, including a portion of the ditch, he has no right to stop up, or even partially obstruct, the ditch below, so as to throw the water back upon the upper part (*Shaw* v. *Etheridge*, 3 Jones' [N. C.] Law, 300); and this is so whether the ditch was originally made to drain the upper part of the tract or not. If it actually answered that purpose, the purchaser was entitled to the unmolested use of it. Id. See *Hazard* v. *Robinson*, 3 Mas. (C. C.) 272.

## ARTICLE II.

### REMEDIES.

**Section 1. In general.** Every injury to a water-course, as by diverting it, and every injury by means of a water-course, by throwing the water back upon a riparian owner above, is deemed a species of tort, denominated a nuisance; and when private rights only are involved, a *private* nuisance. Ang. on Water-courses, § 388. And see Vol. 4, pp. 738 *et seq.* Now, at common law, there are two ways to redress a nuisance, one by action, or the party aggrieved may enter and abate the nuisance himself. *Baten's Case*, 9 Co. Rep. 54 l. Thus, it is well settled, that if A interrupt or divert water from flowing to the mill of another by its ancient course, the owner of the mill may lawfully enter upon A's land and remove the obstruction (*Hodges* v. *Raymond*, 9 Mass. 316; *Brown* v. *Chadbourne*, 31 Me. 126); and indeed, in all cases of wrongfully diverting or detaining the water, and of flowing land, etc., the aggrieved party may, by the common law, enter the close of his neighbor for the purpose of abating the nuisance, or removing the cause of the injury to which he has been thus subjected. Id.; *Cooper* v. *Barber*, 3 Taunt. 99; *Greenslade* v. *Halliday*, 6 Bing. 379; *Strong* v. *Benedict*, 5 Conn. 210; *Groton* v. *Haines*, 36 N. H. 388. And it is held that, where a party can maintain an action for a nuisance, he may enter and abate it, even though at the time it caused only nominal damage to him (*Amoskeag Manuf. Co.* v. *Goodale*, 46 N. H. 53); and the abatement of a nuisance by the plaintiff does not preclude him, in an action on the case, from a recovery of damages sustained anterior to such abatement. *Gleason* v. *Gary*, 4 Conn. 418; *Pierce* v. *Dart*, 7 Cow. 609.

But in abating a private nuisance, a party must proceed in a reasonable manner. No more injury to the property of another must be inflicted than is absolutely necessary to accomplish the object. *Great Falls Co.* v. *Worster*, 15 N. H. 412; *State* v. *Moffett*, 1 Green (Iowa), 247; *Gates* v. *Blincoe*, 2 Dana (Ky.), 158. The abatement should be limited to its necessities, and should be effected with the least practicable injury to the object which creates the grievance. *Veazie* v. *Dwinel*, 50 Me. 479, 496. If a person, entitled to raise a stream of water to a certain height, raises it higher than he is entitled to do, the person injured thereby, though he may reduce the dam, has no right to demolish it. *Dyer* v. *Depui*, 5 Whart. (Penn.) 584; *Wright* v. *Moore*, 38 Ala. 593. And see *Greenslade* v. *Halliday*, 6 Bing. 379. So, if there be two ways of abating a nuisance, the party who undertakes the abate-

ment must choose the least injurious of the two (*Roberts* v. *Rose*, L. R., 1 Exch. 84, 89); on the other hand he is not bound to exercise his right of removal in the most convenient way for the party whose wrongful act gives occasion for the removal. He may make it effectual. *Great Falls Co.* v. *Worster*, 15 N. H. 412. And it was held, in an early English case, that where a riparian owner erects a dam partly on his own land and partly on the land of another, and the latter thereupon pulls down the part of the dam which is on his land, by which the entire dam is prostrated, the act of pulling down the part of the dam will be justifiable. *Wigford* v. *Gill*, Cro. Eliz. 269; Ang. on Water-courses, § 391. And see Vol. 4, pp. 773 *et seq.*

In addition to the remedies for private nuisances by an action on the case for damages, and by act of the party, or by *abatement*, there were formerly two others known to the common law, namely, assize of nuisance, and the writ of *quod permittat prosternere.* Both these remedies had given way to the action on the case in England, long before they were expressly abolished by the statute of 3 & 4 Wm. 4, ch. 27, § 36. See 3 Black. Com. 221; and the proceedings therein are declared to be obsolete in this country. *Blunt* v. *Aiken*, 15 Wend. 522, 525; *Waggoner* v. *Jermaine*, 3 Denio, 306, 310. See *Barnet* v. *Ihrie*, 17 Serg. & R. 175; *Gleason* v. *Gary*, 4 Conn. 418; *Great Falls Co.* v. *Worster*, 15 N. H. 412, 435.

§ 2. **Action at law.** We have already seen that, in the case of a *private* nuisance, all damages that are the natural and probable consequence of the nuisance may be recovered in an action on the case (Vol. 1, p. 108); and this is the remedy now resorted to in the ordinary cases of consequential injury done to, or by means of a water-course. See *Thompson* v. *Moore*, 2 Allen, 350; *Brigham* v. *Wheeler*, 12 id. 89; *Baer* v. *Martin*, 8 Blackf. (Ind.) 317. Thus, it is said, if a person pour water upon his neighbor's land, the injury is immediate, and the aggrieved party must bring *trespass;* but if he stop a water-course upon his own land, or place a spout in such a direction as to damage the land of another, these latter acts produce *consequential* mischief, and the party should resort to his action on the case. 1 Chit. Pl. (7th ed.) 124; Woolry. on Wat. 277; *Reynolds* v. *Clarke*, 2 Ld. Raym. 1399. So where the defendant dug ditches, and so diverted the plaintiff's water out of the river, and damaged the meadows of the plaintiff, an action upon the case was brought and sustained. *Loveridge* v. *Hoskins*, 11 Mod. 257. An action of a similar nature was held to lie against a party for continuing a bank, so as to surround the plaintiff's meadow with water. *Beswick* v. *Combdon*, cited in Woolry. on Wat. 273. An action on the case is also the proper remedy for the proprie-

tor of a house, whom it annoyed by the continual dropping of water from an adjoining dwelling. Moore, 353. And where the defendant erected a cornice upon his house, so that the rain water flowed from the cornice into the plaintiff's garden adjoining and damaged the garden, it was held that an action would lie, and that the cornice was a nuisance from which injury to the plaintiff might be inferred. *Fay* v. *Prentice*, 1 C. B. 829. And, in general, where the defendant so disturbs the plaintiff in his stream or water-course, as to occasion consequential damages, case is the proper action, in all cases where the defendant does the original act on his own land. 3 Dane's Abr. 10. And see *Bigelow* v. *Battle*, 15 Mass. 313; *Groton* v. *Haines*, 36 N. H. 388; *Shafer* v. *Smith*, 7 Harr. & J. (Md.) 67; *Fisk* v. *Framingham Manuf. Co.*, 12 Pick. 67; *Whetstone* v. *Bowser*, 29 Penn. St. 59; *Bare* v. *Hoffman*, 79 id. 71; S. C., 21 Am. Rep. 42.

It has however been held that, since the use of streams of water for domestic, agricultural, and manufacturing purposes is, to some extent, of public right, an action for a nuisance caused by any obstruction or diversion of the water of a stream for any such purpose will not lie, unless the damage occasioned thereby is real, material, and substantial. *McElroy* v. *Goble*, 6 Ohio St. 187.

§ 3. **Injunction.** See Vol. 3, pp. 710 *et seq.* Among the cases of a nature calling for the remedial interposition of courts of equity by way of injunction, are enumerated the "obstruction or pollution of water-courses, the diversion of streams from mills, the back flowage on mills, and the pulling down of the banks of rivers, and thereby exposing adjacent lands to inundation, or adjacent mills to destruction." 2 Story's Eq. Jur., § 927. See, also, *Lewis* v. *Stein*, 16 Ala. 214; *Frink* v. *Lawrence*, 20 Conn. 117; *Binney's Case*, 2 Bland's (Md.) Ch. 99. But, although a court of equity has the necessary power to restrain a party in the use of water in a manner injurious to another, yet the court will not exercise this summary authority where the right is doubtful, or the facts are not definitely ascertained; it being the duty of the court rather to protect acknowledged rights, than to establish new and doubtful ones. *Roath* v. *Driscoll*, 20 Conn. 533; *Fisk* v. *Wilber*, 7 Barb. 395; *Prentiss* v. *Larnard*, 11 Vt. 135. A complainant who asks the court to restrain by injunction a threatened invasion of his rights must show a strong *prima facie* case in support of the title which he asserts, and that he has been guilty of no delay in applying for the interposition of the court. Thus, it is held, that on a riparian proprietor, seeking to restrain another from using the water of a stream, he must first have established his rights to be as certain and undoubted as if ascertained by the verdict of a jury. *Bliss* v. *Kennedy*, 43 Ill. 67.

And see *Burnham* v. *Kempton*, 44 N. H. 78; *Shields* v. *Arndt*, 3 Green's (N. J.) Ch. 234. Where the damage is not serious, it is held that equity will not interfere (*Att.-Gen.* v. *Gee*, L. R., 10 Eq. 131); and if it appears that the removal of an obstruction to a water-course will still leave it impossible for the party claiming the right to it to derive any benefit firom it, a court of equity will not lend its aid to a removal. *Owen* v. *Field*, 12 Allen, 457. And as the province of the injunction is to prevent future mischief, it will not, of course, afford a remedy for a past diversion of water (*Burnham* v. *Kempton*, 44 N. H. 78, 101); but if the injuries by diversion are continued, or the right to continue them set up and persisted in by the defendants, a court of equity will, if the facts be properly established, interfere by injunction effectually to protect the complainants. *Society for Establishing Manufactures* v. *Morris Canal Co.*, 1 Saxt. (N. J.) Ch. 157. In a great variety of cases, the very ground of the interposition of a court of equity is, that the right can only be permanently preserved or perpetuated by the powers of such court; and one of the most ordinary processes to accomplish this end is by a writ of injunction. If, therefore, the diversion of the water complained of is a violation of the right of the plaintiff, and may permanently injure that right, and become, by lapse of time, the foundation of an adverse right in the defendant, there is no more fit case for the interposition of a court of equity by way of injunction to restrain the defendant from such an injurious act. *Webb* v. *Portland Manuf. Co.*, 3 Sumn. (C. C.) 189. And see *West* v. *Walker*, 2 Green's (N. J.) Ch. 279; *Burwell* v. *Hobson*, 12 Gratt. (Va.) 322; *Mayor, etc.* v. *Commissioners of Spring Garden*, 7 Penn. St. 348. Vol. 1, p. 40.

So, where hydraulic works are erected on both banks of a water-course, the owners of the works are each entitled to an equal share of the water; and if the owner of the mills on either side attempts to deprive the other of the use of his share of the water, of which he has been in the quiet enjoyment, and thus to destroy his mills, a preliminary injunction will be granted, on the ground that the injury may be irreparable. *Arthur* v. *Case*, 1 Paige, 447; S. C. affirmed, 3 Wend. 632. A deprivation of the use of a stream by corrupting it so as to render it unfit for use is an equally irreparable injury, entitling the party injured to the like preventive remedy. When the nuisance operates to destroy health, or to diminish the comfort of a dwelling, an action at law furnishes no adequate remedy, and the party injured is entitled to protection by injunction. *Holsman* v. *Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335; *Lewis* v. *Stein*, 16 Ala. 214; *Merrifield* v. *Lombard*, 13 Allen, 16.

Although, as a general principle, if the injury be already done, the writ of injunction can have no operation; yet, the rule admits of exceptions, and there is, it is said, no good reason why the court should not, in clear cases, exercise a power to *abate* as well as to prevent the erection of nuisances. Thus, if the court can decree the unlawful and injurious obstruction of a water-course to be a nuisance, it should possess the power to give efficacy to such a decree, otherwise it pronounces a judgment it has not power to execute. *Earl* v. *De Hart*, 1 Beas. (N. J.) Ch. 280. And see *East India Co.* v. *Vincent*, 2 Atk. 83; *Att.-Gen.* v. *Parmenter*, 10 Price, 378; *Maine* v. *Wilkinson*, 2 Sumn. (C. C.) 273, 276. So, in *Van Bergen* v. *Van Bergen*, 2 Johns. Ch. 272, it was said that, in cases of private nuisances, the court can order them to be abated, as well as restrain them from being erected. And the right of the court to decree that a dam shall be lowered which raises a stream of water above its natural channel, so as materially to injure mills above was affirmed in *Hammond* v. *Fuller*, 1 Paige, 197. See, also, *Ackerman* v. *Horicon Co.*, 16 Wis. 150; *Hill* v. *Sayles*, 12 Cush. 454.

§ 4. **Action, by whom brought.** An action upon the case for a nuisance can be maintained by the tenant in possession, and also by the landlord or reversioner. Title is not necessary, unless the plaintiff seeks to recover full damages for the injury to his property. From the very nature and necessity of the case, a temporary occupant must be entitled to sue, and as such occupant is only entitled to recover damages sufficient to compensate him for the injury sustained; an action must also be given to the reversioner, or the party sustaining perhaps the largest amount of damages would be left remediless. *Alston* v. *Scales*, 9 Bing. 3; *Bell* v. *Twentyman*, 1 Ad. & El. (N. S.) 766; *Woodbury* v. *Willis*, 50 Me. 403; *Ashley* v. *Ashley*, 4 Gray, 197. It follows that the occupant of premises injured by the setting back of water upon the land may recover damages against the wrong-doer, to an amount sufficient to indemnify him for the injury to such interest as he had in the premises; and an action will also lie by the reversioner for the injury done to the inheritance. *Brown* v. *Bowen*, 30 N. Y. (3 Tiff.) 519.

It is held that the reversioner of the freehold, after a tenancy for years, may maintain an action on the case against one who erects a dam on the adjacent ground, and backs the water of the stream into the plaintiff's race. *Ripka* v. *Sergeant*, 7 Watts & Serg. 9. So, building a roof with eaves which discharge rain-water by a spout into adjoining premises, is an injury for which the landlord of such premises may recover, as reversioner, while they are under demise, if the jury think

there is a damage to the reversion. *Tucker* v. *Newman*, 11 Ad. & El. 40.

The owner of a mill-privilege, on which a mill has formerly stood, but on which no mill is actually standing, is entitled to an action against one, who, by erecting a dam below, renders the site useless for the purpose of erecting a mill, unless the owner has abandoned it evidently with an intent to leave it unoccupied; and the right to such action, by a mortgagee, commences at the time he takes actual possession of the mortgaged premises. *Hatch* v. *Dwight*, 17 Mass. 289. An action may also be supported by a devisee for a continuance of the nuisance (*Some* v. *Barwish*, Cro. Jac. 231); and, in general, if the nuisance be continued, a fresh action may be maintained by the alienee, whether he fill the situation of tenant in possession, or reversioner. Ang. on Water-courses, § 399; *Shadwell* v. *Hutchinson*, 2 B. & Ad. 97. When the land injured by the nuisance has been conveyed since the erection of the nuisance, the purchaser stands in the same position as the vendor. He may sue the original wrong-doer; the person who erected and still maintains the nuisance, without notice or request to abate, for the damage done to the land while he owned and occupied it. Nor does it matter in this respect how many times the land injured may have changed hands since the erection of the nuisance. *Eastman* v. *Amoskeag Manuf. Co.*, 44 N. H. 143. But see *Woodman* v. *Tufts*, 9 id. 88. Vol. 4, p. 770.

Tenants in common may join as plaintiffs in an action for diverting a water-course. *Stone* v. *Bromwich*, Yelv. 161; Ang. on Water-courses, § 400. And one tenant in common may maintain an action on the case against his co-tenant for diverting the water from their common mill, for his own separate purposes. *Pillsbury* v. *Moore*, 44 Me. 154. See, also, *Odiorne* v. *Lyford*, 9 N. H. 502.

A water commissioner, under the statutes of California, has no power as such to repair or to remove an obstruction from a water-course. *Pico* v. *Colimas*, 32 Cal. 578.

§ 5. **Action, against whom brought.** See Vol. 4, pp. 770 *et seq.* An action on the case lies against him who erects a nuisance, and, notwithstanding a recovery for the erection, the action may afterward be maintained against him for the *continuance*, though he has made a lease of it to another. He transferred it with the original wrong, and his demise affirms the continuance of it. He also has rent as a consideration for the continuance, and, therefore, ought to answer the damage it occasions. *Grady* v. *Wolsner*, 46 Ala. 381; S. C., 7 Am. Rep. 593. And see *Swords* v. *Edgar*, 59 N. Y. (14 Sick.) 28; S. C., 17 Am. Rep. 295. So, if one erects a nuisance on his own land by obstructing a water-

course, to the injury of the land of another, and then conveys the premises to a purchaser with warranty, he nevertheless remains liable in an action on the case for the damages occasioned by the continuance of the nuisance subsequent to the conveyance. *Waggoner* v. *Jermaine*, 3 Denio, 306. It is, however, at the option of the party injured, to bring his action either against the person who originally created the nuisance, or the person in possession of the premises, who suffers it to continue. *Staples* v. *Spring*, 10 Mass. 72; *Beidelman* v. *Foulke*, 5 Watts, 308. No notice or request is necessary before bringing suit against the original wrong-doer in such case for the damages sustained; but the grantee of the nuisance is not liable to the party injured, until, upon request made, he refuses to remove the nuisance. *Pillsbury* v. *Moore*, 44 Me. 154; *Eastman* v. *Amoskeag Manuf. Co.*, 44 N. H. 143; *Noyes* v. *Stillman*, 24 Conn. 15; *Pierson* v. *Glean*, 2 Green (N. J.), 36. But no particular form of notice or request is required when necessary in such cases. It may be either written or verbal, or it may be by acts alone, clearly informing the party to be affected by it, of the fact of the existence of the nuisance, and of the desire of the party injured for its removal. *Carleton* v. *Redington*, 21 N. H. 291.

Where a nuisance is committed by several, and is a *malfeasance*, the plaintiff may sue any of those who did the wrong, and the non-joinder of the others cannot be pleaded in abatement. 1 Chit. Pl. (7th ed.) 98; Ang. on Water-courses, § 404. Thus, if the rightful flow of the water of a stream is obstructed by the joint action of several parties, although not acting in combination or by concert, it is no defense to the maintenance of an action against one of them that all are not joined as defendants; but this objection goes only to the damages. *Wheeler* v. *City of Worcester*, 10 Allen, 591.

In an action to restrain the diversion of water by tort-feasors, one of the tort-feasors, who resides beyond the jurisdiction of the court, may be omitted. *Cole Silver Mining Co.* v. *Virginia, etc., Water Co.*, 1 Sawyer (C. C.), 470.

## ARTICLE III.

### DEFENSES.

**Section 1. In general.** It is an established general rule, that every proprietor of land, through which a natural water-course runs, has an equal right to the use of the water for every useful purpose to which it can be applied, as it is wont to run, without diminution or alteration. This right is not an easement or appurtenance, but is inseparably annexed to the soil, and is parcel of the land itself. *Wadsworth* v. *Til-*

*lotson*, 15 Conn. 366; *Gardner* v. *Newburgh*, 2 Johns. Ch. 162; *McCord* v. *High*, 24 Iowa, 336; *Walker* v. *Board of Public Works*, 16 Ohio, 540. Consequently, no proprietor has the right to use the water to the prejudice of any other proprietor above or below him, unless he has acquired a right to use the water in some peculiar manner, and differently from what he would be entitled to do, as mere riparian proprietor; which he may do by an actual grant or license from the proprietor affected by his operations, or an uninterrupted enjoyment for such a length of time as would afford a conclusive presumption of a grant. This acquired right, as constituting a defense to actions for injuries resulting from a use of the water in excess of the natural right, will be considered in the following sections.

§ 2. **Adverse possession.** A person acquires a right to the use of the water in a particular manner, by an uninterrupted *adverse enjoyment* of such use over twenty years. *Pillsbury* v. *Moore*, 44 Me. 154. See *ante*, p. 261, Art. 1, § 5; Vol. 2, pp. 693 *et seq.* Though the stream be either diminished in quantity or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it has existed for so long a time (twenty years) as may raise the presumption of a grant, the other party whose land is below must take the stream subject to such adverse right. *Beady* v. *Shaw*, 6 East, 208; *Smith* v. *Adams*, 6 Paige, 435; *Bucklin* v. *Truell*, 54 N. H. 122. The burden of proving the adverse possession is said to rest on the party claiming the easement; and if he leaves it doubtful whether the enjoyment was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor. *Stevens* v. *Taft*, 11 Gray, 33; *Polly* v. *McCall*, 37 Ala. 20; *Davies* v. *Stephens*, 7 Carr. & P. 570; 2 Greenl. Ev., § 539. But if he shows a well-known, an open and uninterrupted enjoyment, proof must come from the other side to show, that it was by license or permission, or that it was to be restrained or limited in point of time. *Finch* v. *Resbridger*, 2 Vern. 390; Ang. on Water-courses, § 221. And see *White* v. *Chapin*, 12 Allen, 516; 97 Mass. 101; *Perrin* v. *Garfield*, 37 Vt. 304, 310; *Garrett* v. *Jackson*, 20 Penn. St. 331; *Steffy* v. *Carpenter*, 37 id. 41; *Ingraham* v. *Hough*, 1 Jones (N. C.), 39; *Watkins* v. *Peck*, 13 N. H. 360. In the case last cited it is held that the adverse or exclusive use of water flowing through an aqueduct, by the owners and occupants of a house, for the term of twenty years, furnishes presumptive evidence of a grant, from the owner of the land through which it is brought, of a right to have it flow in the manner it has been accustomed to do for that period. See *Trask* v. *Ford*, 39 Me. 437; *Tracy* v. *Atherton*, 36 Vt. 503. See *Adverse Possession*.

§ 3. **License.** The effect of a parol license to flow land is, to protect the person acting by the authority of it against an action for damages until it is revoked by the licensor. A licensee may give evidence of the license, and thus defeat a claim for damages by the licensor, sustained while the license remains unrevoked. Ang. on Water-courses, § 387. But a parol license will convey no *permanent* interest in land. A water right, as an incorporeal hereditament, can only be assigned by deed, devise, or record. *Fentinam* v. *Smith*, 4 East, 107; *Cocker* v. *Cowper*, 1 Cr. M. & R. 418; *Holmes* v. *Cook*, 11 Mass. 528, 533; *Houston* v. *Laffee*, 46 N. H. 505. See *Ortman* v. *Dixon*, 13 Cal. 33. Thus, in an action for obstructing a drain, the plaintiff claimed right and title to the drain by virtue of a license granted to his landlords, their heirs and assigns, to make the drain and have the foul water pass from their scullery through the drain across the defendant's yard, into another yard appurtenant to the premises in the plaintiff's occupation; and it was held that the interest, as declared upon by the plaintiff, being in its nature freehold, and the license to support it being merely by parol and not by deed, the action was not maintainable. *Hewlins* v. *Shippam*, 5 Barn. & C. 221; S. C., 7 D. & R. 783. See, also, *Wood* v. *Edes*, 2 Allen, 578, 580; *Hall* v. *Chaffee*, 13 Vt. 150; *Branch* v. *Doane*, 17 Conn. 402. So, it was held by the court in Maine, that the right to overflow the land of the complainant, without paying damages, cannot be established by proof of a parol agreement or license made with his grantors. *Seidensparger* v. *Spear*, 17 Me. 123. See *Clement* v. *Durgin*, 5 id. 9.

A license to take a quantity of water at any particular place will not authorize the taking away of the same quantity of water at another place. *Mason* v. *Hill*, 5 B. & Ad. 1; S. C., 2 Nev. & M. 747. So, it is held that a license is in all cases revocable, so for as it remains unexecuted, or so far as any future enjoyment of the easement is concerned at the will of the licensor (Id. And see *Wright* v. *Freemon*, 5 Harr. & J. [Md.] 467; *Bridges* v. *Purcell*, 1 Dev. & Bat. [N. C.] 492; *Mumford* v. *Whitney*, 15 Wend. 380; *Ruggles* v. *Lesure*, 24 Pick. 187; *Marston* v. *Gale*, 24 N. H. 176), even where the licensee has made an expenditure of money upon the land of the licensor upon the faith of such license. *Houston* v. *Laffee*, 46 N. H. 505. Thus, in an action of trespass for cutting off lead pipe which the plaintiff had laid upon the land of the defendant under a parol license, for the purpose of conveying water to the plaintiff's house, it was held that the plaintiff could not recover the money expended in digging or deepening the well, or purchasing or laying the pipe, or any consequential damage suffered at his house or stable in consequence of the stopping of the water at that

particular time. He can only recover for the actual injury to the pipe and possibly exemplary damages, if the act was unnecessary and malicious. Id. The authorities are not, however, all agreed as to the form of the remedy which the licensee should pursue to recover back the money he has expended; some holding that it may be done in an action at law for breach of contract, others that it must be in equity by compelling specific performance. See *Miller* v. *Tobie*, 41 N. H. 84; *Foot* v. *New Haven, etc., Co.*, 23 Conn. 214; *Dark* v. *Johnson*, 55 Penn. St. 164; *Wood* v. *Edes*, 2 Allen, 578; *Morse* v. *Copeland*, 2 Gray, 302; *Wood* v. *Leadbitter*, 13 M. & W. 838. It is held, in *Hall* v. *Chaffee*, 13 Vt. 150, that in cases where money has been expended upon the faith of a parol license, so that the parties cannot now be placed in *statu quo*, a court of equity would grant relief as in any other case of part performance of a parol contract for the sale of land or any interest therein, upon the ground of preventing fraud. And see *Prince* v. *Case*, 10 Conn. 375; 2 Am. Lead. Cas. 540–597; *Lacy* v. *Arnett*, 33 Penn. St. 169; *Beatty* v. *Gregory*, 17 Iowa, 114; *Stephens* v. *Benson*, 19 Ind. 369.

A verbal license may terminate without any act of revocation on the part of the licensor. 3 Kent's Com. 452; Ang. on Water-courses, § 325; *Allen* v. *Fiske*, 42 Vt. 462, 464. Thus, a verbal license to erect a dam on one's own land and flow the lands of another, nothing appearing as to the period of its expected duration, terminates with the *decay of the dam*, and gives no right when the dam has become decayed and ruinous, to re-erect or repair it and reflow the land. *Hepburn* v. *M'Dowell*, 17 Serg. & R. 383; *Carleton* v. *Redington*, 21 N. H. 291; *Cowles* v. *Kidder*, 24 id. 364.

§ 4. **By special agreement.** Water-rights of a very limited nature, and subservient to the more general rights of the riparian proprietors, may be created by a special contract or agreement in writing; and the extent and mode of the use of the water may be affected and determined by any considerations, conditions, and modifications, which the assent of the parties interested may impose. *Tyler* v. *Wilkinson*, 4 Mas. (C. C.) 397; *Northam* v. *Hurley*, 1 El. & Bl. 665; Ang. on Water-courses, § 255. Contracts of this kind are to be construed with reference to the actual state of the premises, at the time the contracts were entered into. *Winnipisseogee Lake, etc., Co.* v. *Perley*, 46 N. H. 83; *Carroll* v. *Cockey*, 3 Harr. & J. (Md.) 282. Thus, should a party, having possession of a manufactory with water-power only, stipulate with another having adjoining premises, to furnish these premises with water-power, during all regular working hours for several years, without exception, it is to be presumed that they know that such

water-power may be, and must necessarily be, occasionally interrupted; that on a very few cold days in the winter, the ice will so clog the wheel, that it may take several hours to clear it; that a freshet may carry away a gate, which will take a few days to replace; and the covenants, though in general terms, are to be taken with necessary and implied exceptions. What are to be deemed occasional interruptions, and what a reasonable time to remove them must depend upon the subject-matter, the knowledge and experience of those conversant with the subject, and all the circumstances of the case, as applied to the subject-matters, and the nature and terms of the contract. SHAW, C. J., in *Mill Dam Foundry* v. *Hovey*, 21 Pick. 417. See *Agawam Canal Co.* v. *Southworth Manuf. Co.*, 121 Mass. 98.

Where from the whole instrument, read in the light of the surrounding circumstances, and of the preliminary and other agreements referred to, it is apparent that it was the purpose of the parties that the plaintiff should sell to the defendant the right to maintain a dam to the height of certain iron bolts; but in making the conveyance, after a grant of that right, there was also a license to raise the water to the height of such bolts, it was held that the latter clause was not to be construed under the circumstances, as a limitation of the height of the dam, but that the grantee acquired the right to maintain a dam of that height and to use it in the ordinary way, although it would sometimes raise the water above such bolts. *Salmon Falls Manuf. Co.* v. *Portsmouth Co.*, 46 N. H. 249. But where, by the preliminary agreement, a right was sold to raise a dam to a certain height above another dam, and afterward by an instrument in writing the parties agreed that certain iron bolts were placed in the rocks to denote the height to which the vendees had the right to raise their dam by virtue of such preliminary agreement, which second agreement was made part of the final instrument of conveyance, it was held that this was conclusive evidence of the height to which the grantees might build their dam. Id.

§ 5. **By grant.** The accessorial right or easements in running water, derived from special grants or reservations of riparian owners, upon a natural water-course, are to be measured by the nature of the grant or reservation, and the express stipulations therein contained. Ang. on Water-courses, § 144. And see *Avon Manuf. Co.* v. *Andrews*, 30 Conn. 476. See, as to the distinction between a grant of the water itself, and a grant of water-power, *Kennedy* v. *Scovil*, 12 Conn. 317; *Mayor, etc.*, v. *Commissioners of Spring Garden*, 7 Penn. St. 348; *Bardwell* v. *Ames*, 22 Pick. 333; *Jackson* v. *Halstead*, 5 Cow. 216. In the absence of specific restrictions in the grant of a water-power, the grantee may make such use of the water as he chooses, provided he does not, by

such use, interfere with the rights of others, gained by long continued, uninterrupted user, and the compacts of previous proprietors. *Hines* v. *Robinson*, 57 Me. 324. A conveyance of a tannery and the land on which it stood, with the "right to draw water sufficient to carry on the business of tanning," the grantee "to have the privilege of using more water when there shall be waste water," was held to give an absolute right to the use of the quantity of water named; and to be a grant of a fixed measure of power to be used for any purpose, and not confined to the business of tanning. *Covel* v. *Hart*, 56 id. 518; *Cromwell* v. *Selden*, 3 Comst. 253; *Comstock* v. *Johnson*, 46 N. Y. (1 Sick.) 615, 620; *Voorhees* v. *Burchard*, 55 N. Y. (10 Sick.) 98, 102.

An express grant of a water-course implies a covenant on the part of the grantor not to disturb the grantee, his heirs or assigns, in the enjoyment of it. 4 Kent's Com. 473. And the rule that, where one, by excavations upon his own land, without interfering with any known water-courses, withdraws water from his neighbor's well or spring by percolation, is not liable for the injury (see *ante*, p. 265, Art. 1, § 8), has no application where there is a grant or covenant between the parties, and the acts complained of are in derogation of the grant or in violation of the covenant. *Johnstown Cheese Manuf. Co.* v. *Veghte*, 69 N. Y. (24 Sick.) 16.

A grant of a right "to flow back the water" of a stream, below a mill, and "to use all the water which naturally flows below said mill," extends only to the water *which flows from the mill-wheel*, the mill being in operation; and only imports a right to dam and detain the water, and not a right to divert it. *Oregon Iron Co.* v. *Trullenger*, 3 Oreg. 1. See *Van Hoesen* v. *Coventry*, 10 Barb. 518; *Bobo* v. *Wolf*, 18 Ohio St. 463.

Where the owner of lands constructed a ditch, through which he caused to run the waters of a creek, and subsequently subdivided the lands and conveyed the parcels to different grantees, it was held that the grantees acquired the right to have the ditch kept open and the waters of the creek to continue to flow therein. *Curtiss* v. *Ayrault*, 5 Sup. Ct. (T. & C.) N. Y. 611; S. C., 3 Hun, 487. But where, from obstructions in the ditch, resulting from the neglect of those interested to do so to keep it open, the waters of the creek had ceased to flow therein, and had been caused to overflow the land of one of the grantees, the construction of a ditch to take such overflowing waters away, so that they did not run through the original ditch, was held not to be a diversion which would render such grantee liable to an action therefor. Id.

Under a grant of the right to lay an aqueduct from a spring on the grantor's land to the grantee's land, together with the privilege of

going upon the grantor's land to repair the aqueduct, after one aqueduct has been laid, and afterward taken up by the grantor, and the easement abandoned for thirty years, the grantee cannot lay a new aqueduct in a new direction over the grantor's land, even though the construction of a railroad has made it impossible to lay it in the old place. *Jennison* v. *Walker*, 11 Gray, 423.

The courts are inclined to construe grants of water liberally, so as to impose no unnecessary restriction upon its use; and where words used will admit of one construction which would limit the use to a particular purpose, and another which would allow the use specified to be merely a measure of the quantity to be used, the latter construction will be adopted. *Rogers* v. *Bancroft*, 20 Vt. 250, 257; *Rood* v. *Johnson*, 26 id. 64. Such will be the construction, unless the terms of the deed seem very clearly to indicate the contrary, and the use has been uniformly consistent with the more limited construction. *Adams* v. *Warner*, 23 id. 395. See *post*, p. 292, § 7; *ante*, p. 290.

The right to the use of flowing water in respect of lands below is not lost by the acceptance of the grant of land above, although such latter grant may expressly reserve to the grantor the right to divert the water generally. *Lord* v. *Sydney*, 12 Moore's P. C. C. 473. And see *Miner* v. *Gilmour*, 12 id. 131.

§ 6. **Statutes.** In many of the States statutes have been enacted encouraging mills by authorizing their owners and occupants to overflow the lands of other persons, by paying such damages as may be assessed in the mode prescribed. See *Shaw* v. *Wells*, 5 Cush. 537; *Burnham* v. *Story*, 3 Allen, 378; *Bradstreet* v. *Erskine*, 50 Me. 407; *Olmstead* v. *Camp*, 33 Conn. 532; *Gillet* v. *Jones*, 1 Dev. & Bat. (N. C.) 339; *Humes* v. *Shugart*, 10 Leigh (Va.), 332; *Hook* v. *Smith*, 6 Mo. 225. The effect of these statutes is, to take away the right which the land-owner *prima facie* possesses of removing from his land a nuisance, and the only judicial remedy of the land-owner is the one prescribed by the statute, which is substituted for the action on the case. *Burnham* v. *Story*, 3 Allen, 378; *Aldrich* v. *Cheshire R. R. Co.*, 21 N. H. 362; *Criswell* v. *Clugh*, 3 Watts, 330; *Veazie* v. *Dwinel*, 50 Me. 485; *Waddy* v. *Johnson*, 5 Ired. (N. C.) 333. But the statutes of Massachusetts do not authorize the mill-owner to make a canal or artificial stream in such a manner as to lead the water into the lands of another person; and, therefore, the remedy of the party, whose land is flowed by such artificial stream, is by an action at common law. *Fiske* v. *Framingham Manuf. Co.*, 12 Pick. 67. So, the remedy for a town against a mill-owner, who overflows a road which the town is obliged to repair and does repair, is an action on the case, and not by a complaint

under the statute. *Andover* v. *Sutton*, 12 Metc. 182. And the remedy for an obstruction of a water-course and preventing the water from flowing to the land of an owner below, as it has been accustomed to flow, by erecting a dam, and closing the gates at night for the purpose of collecting the water, is by an action of tort, and not by a complaint under the mill acts. *Thompson* v. *Moore*, 2 Allen, 350. And see *Murdock* v. *Stickney*, 8 Cush. 116; *Winkley* v. *Salisbury Manuf. Co.*, 14 Gray, 443.

So, the statutes in relation to the right of erecting mills and mill-dams, and of flowing lands, are not to be so construed as to excuse or justify the erection of a dam in such a manner as to destroy the public easement or right of way in a stream upon which it is constructed. *Treat* v. *Lord*, 42 Me. 552; *Parks* v. *Morse*, 52 id. 260.

The statute of New York (1 R. S. 739, § 147), making void conveyances of land held adversely, does not apply to rights appurtenant to land, such as the right to the flow of water in its natural channel. That right will pass to a purchaser of the land, although the diversion of the water was made before the conveyance, and the right to divert it is still claimed by the party causing it. *Corning* v. *Troy Iron, etc., Factory*, 40 N. Y. (1 Hand) 191; affirming S. C., 39 Barb. 311.

§ 7. **Right reserved.** The grantor of an easement in water may restrict the purposes for which it shall be used. *Mandeville* v. *Comstock*, 9 Mich. 536. So, an easement in water may be reserved in a deed of conveyance of the land, or retained by an exception in such deed; and in such reservation or exception, every thing is withheld by the grantor which is essential to the enjoyment of the easement. See *Miller* v. *Lapham*, 44 Vt. 416; *Winthrop* v. *Fairbanks*, 41 Me. 307; *Claremont* v. *Carlton*, 2 N. H. 371. Where land was conveyed, with all the buildings standing thereon, *except* the "brick factory," it was held that the grantor's title to the land on which the factory stood, and the water privilege appurtenant thereto, did not pass by the deed. *Allen* v. *Scott*, 21 Pick. 25. So, an exception of a mill-site in a grant or lease operates as an exception of the soil of the mill-site, and so much land as is necessary for the mill-pond, and for erecting and carrying on the business of a mill. *Jackson* v. *Vermilyea*, 6 Cow. 677.

The reservation in a lease of all water-courses on the demised premises suitable for the erection of mills, with the right of erecting mills and other works thereon, with a certain number of acres of land adjoining thereto, gives the lessor a right to all the mill-sites whenever he chooses to make a location (*Russell* v. *Scott*, 9 Cow. 279); but such a reservation or exception extends only to *natural* mill-sites, and not to places where mills might be erected and supplied with water by means of

sluices or other artificial contrivances. *Jackson* v. *Lawrence*, 11 Johns. 191. And see *Butz* v. *Ihrie*, 1 Rawle (Penn.), 218; *Moore* v. *Fletcher*, 16 Me. 63.

In a lease of premises with their appurtenances the lessor reserved out of the demise, "the free running of water and soil coming from any other buildings and lands contiguous to the premises, in and through the sewers and water-courses, made or to be made within, through or under the premises;" and it was held, *first*, that the reservation extended to water and soil coming from contiguous lands and buildings, whether that water or soil in the first instance actually arose on or from such contiguous lands or buildings or not; and, *second*, that it did not extend beyond water in its natural condition, and such matters as are the product of the ordinary use of land for habitation, and that, therefore, it did not give the occupier of certain tan-pits who claimed, under the lessor, a right of passage for the refuse of those pits. *Chadwick* v. *Marsden*, L. R., 2 Exch. 285.

Under a reservation in a grant of lands and water privileges of sufficient water to propel certain specified machinery, the grantor is entitled to the use of the water for any purpose not requiring a greater power than is reserved. Thus, where the owner of lands upon a mill-stream granted a portion thereof, together with water sufficient to operate a saw mill at all times, when there should be more than enough to drive a grist mill with three run of stone, and certain other specified machinery, it was held that the grantor in the deed and those holding under him were not restricted in the use of the water to the particular objects mentioned in the deed, but might use the quantity reserved for any other purpose. *Cromwell* v. *Selden*, 3 N. Y. (3 Comst.) 253. And see *Comstock* v. *Johnson*, 46 N. Y. (1 Sick.) 615; *Merrill* v. *Calkins*, 10 Hun (N. Y.), 495; *Griswold* v. *Hodgman*, 2 id. 97; S. C., 4 Sup. Ct. (T. & C.) 325. *Ante*, p. 290.

§ 8. **Limitations.** We have seen (*ante*, p. 286, § 2) that a person acquires a right to the use of water in a particular manner, by an uninterrupted adverse enjoyment of such use over twenty years. From such a possession, continued for such period, the law will presume a grant, or courts will direct juries to presume a grant. See *Coolidge* v. *Learned*, 8 Pick. 504; *Bucklin* v. *Truell*, 54 N. H. 122. The fiction of presuming a grant from twenty years' possession or use was invented by the English courts in the eighteenth century, to avoid the absurdities of their rule of legal memory, and was derived by analogy from the limitation prescribed by the statute of 21 Jac. I, c. 21, for actions of ejectment. It is not founded on a belief that a grant has actually been made in the particular case, but on the general presumption that a

man will naturally enjoy what belongs to him, the difficulty of proof after lapse of time, and the policy of not disturbing long continued possessions. *Lewis* v. *Price*, 2 Wms. Saund. 175 *a* and note; *Edson* v. *Munsell*, 10 Allen, 557. Most of the statutes of limitations in the United States, like the English statute of James I, c. 16, prescribe the period of twenty years for the right of entry upon lands held adversely (See *Miller* v. *Garlock*, 8 Barb. 153; *Griffin* v. *Foster*, 8 Jones [N. C.], 339; *Manier* v. *Myers*, 4 B. Monr. [Ky.] 514; *Campbell* v. *Smith*, 3 Halst. [N. J.] 140; *Pierre* v. *Fernald*, 26 Me. 436; *Cuthbert* v. *Lawton*, 3 McCord [S. C.], 194; *ante*, p. 261, Art. 1, § 5); and the doctrine that easements of every sort may be acquired by an adverse user, for the period of time limited by the statute of limitations for the right of entry upon land, has been adopted and frequently applied by our courts. Id.; *Ricard* v. *Williams*, 7 Wheat. 59; *Blake* v. *Everett*, 1 Allen, 248; *Tracy* v. *Atherton*, 36 Vt. 510. But the enjoyment and exercise must be adverse in the exact sense that the possession of the land must be so, to warrant the application of the statute of limitations in an action of ejectment. *Hart* v. *Vose*, 19 Wend. 365; *ante*, p. 286, § 2; Vol. 2, pp. 693 *et seq.* As it respects the acquisition of an easement to enjoy a water-course, it is said to be immaterial whether the water-course be natural or artificial (*Crittenton* v. *Alger*, 11 Metc. 281); and a title may be gained by twenty years' user as well to artificial water-courses as to natural ones. *Earl* v. *DeHart*, 1 Beas. (N. J.) 280; *Major* v. *Chardwick*, 11 Ad. & El. 571; *Watkins* v. *Peck*, 13 N. H. 360; *Ivimey* v. *Stocker*, L. R., 1 Ch. App. 396. Thus, it is held to be a well-established doctrine that the upper proprietor, by use for a sufficient time, may acquire the right to keep open an ancient agricultural ditch through land below for the purpose of draining his own premises. *White* v. *Chapin*, 12 Allen, 516. And see *Prescott* v. *White*, 21 Pick. 342. But the servitude which subjects the lower land to the continued discharge of water from an artificial cut above may be created under circumstances which do not establish a correlative right to the continuance of the discharge for the benefit of the lower estate. The submission to the exercise of an easement by the owner of the dominant estate, for his own purposes and in his own way, does not necessarily give the servient owner a right to the continuance of the easement imposed, because it is attended with incidental advantages to the latter. *White* v. *Chapin*, 12 Allen, 516. And see *Beeston* v. *Weate*, 5 El. & Bl. 986. Thus, the flow of water for twenty years from the eaves of a house could not give a right to the neighbor to insist that the house should not be pulled down or altered, so as to diminish the quantity of water (*Wood* v. *Waud*, 3 Exch. 748, 779;

and the flow of water from a drain, for the purposes of agricultural improvements, for twenty years, could not give a right to the neighbor so as to preclude the proprietor from altering the level of his drains for the greater improvement of the land. The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right. Id.; *Greatrex* v. *Hayward*, 8 Exch. 291; *Rawstron* v. *Taylor*, 11 id. 369; *Mason* v. *Shrewsbury, etc., Railway*, L. R., 6 Q. B. 578; *Gaved* v. *Martyn*, 19 C. B. (N. S.) 732; *Staffordshire, etc., Canal Co.* v. *Birmingham Canal Navigations*, L. R., 1 H. L. Cas. 254. And see *Felton* v. *Simpson*, 11 Ired. (N. C.) 84. And, in general, the right to artificial water-courses, as against the party creating them, depends upon the character of the water-course, whether it be of a permanent or a temporary nature, and upon the circumstances under which it is created. *Sutcliffe* v. *Booth*, 9 Jur. (N. S.) 1037. In *Middleton* v. *Gregorie*, 2 Rich. (S. C.) Law, 631, it was held that the proprietor of lands below may, by prescription, acquire the right to have water, which, in its natural course, flowed through and over his lands, diverted from its natural course, and thrown back upon the lands of the proprietor above.

A custom in a particular country for all persons to use the water in their districts for certain purposes, as, for instance, mining, will not prevent a man from gaining a prescriptive right to the use of water subject to such custom. *Gaved* v. *Martyn*, 19 C. B. (N. S.) 732.

# CHAPTER CXXXII.

## WAYS AND HIGHWAYS.

### ARTICLE I.

#### OF HIGHWAYS.

**Section 1. Definition and nature.** A highway is a passage, road or street, which every citizen has a right to use. *Sutcliffe* v. *Greenwood*, 8 Price, 535; *Rex* v. *Cumberworth*, 3 B. & Ad. 108; *Makepeace* v. *Worden*, 1 N. H. 16; *Jackson* v. *Hathaway*, 15 Johns. 447; *Stackpole* v. *Healy*, 16 Mass. 33. The term *highway* is the generic name for all kinds of public ways, whether they be carriageways, bridleways, footways, bridges, turnpike roads, railroads, canals, ferries or navigable rivers.

To constitute a highway, the way must be one over which all the people of the State have a common and an equal right to travel, or at least a general interest to keep unobstructed. *People* v. *Jackson*, 7 Mich. 432. The mere fact that a highway has been laid out is not sufficient; there must be an existing thoroughfare, suitable for travel. *Beckwith* v. *Whalen*, 70 N. Y. (25 Sick.) 430. Where a way is opened as a private passway and that fact clearly appears, it cannot be converted into a public highway by the mere use thereof, no matter how long that use may be continued. *Hall* v. *McLeod*, 2 Metc. (Ky.) 98. A public highway may be established only by condemnation under the statute, by grant from the owner, or long continued user for twenty years or more, implying a previous grant, or by dedication to the public use by the owner of the soil. *Grube* v. *Nichols*, 36 Ill. 92. There must be certainty of limits and direction in laying it out. *Hicks* v. *Fish*, 4 Mas. (C. C.) 310; *Briggs* v. *Guilford*, 8 Vt. 270. It must, at least, be of public utility if not of necessity; a mere courtesy can never grow into a right. *Witter* v. *Harvey*, 1 McCord (S. C.), 67; *The State* v. *Nudd*, 23 N. H. 327. And to make use of land for a road by the public adverse as to the party who holds the paper title, some act must be done showing a claim of right, such as working the road, attaching it to a road district, or some other act of the proper authorities recognizing it as a highway. *State* v. *Joyce*, 19 Wis. 90.

A public highway, however established, cannot be altered or changed at the will of the owner of the land over which it passes. *Holcraft* v. *King*, 25 Ind. 352. But the public have no right in a highway, except to pass and repass thereon; they cannot therefore justify turning their cattle thereon for the purpose of grazing. *Stackpole* v. *Healy*, 16 Mass. 33. The term "highway," as used in the road acts and proceedings under them, is synonymous with a lawful public road. *Vantilburgh* v. *Shann*, 4 Zabr. (N. J.) 740.

A way ceases to be a public highway when the access to it at either end has become impossible by reason of ways leading to it having been legally stopped up. *Bailey* v. *Jamieson*, L. R., 1 C. P. Div. 329; S. C., 24 W. R. 34; L. T. (N. S.) 62; 17 Eng. Rep. 289.

A dedication of a way from user can only be presumed in favor of the public generally, and not in favor of the inhabitants of a particular parish. *Bermondsey* v. *Brown*, L. R., 1 Eq. 204.

§ 2. **What are highways.** A turnpike road is a public highway, established by public authority for public use, and is to be regarded as a public easement. The only difference between this and a common highway is, that instead of being made at the public expense in the first instance, it is authorized and laid out by public authority, and made at the expense of individuals in the first instance, and the cost of construction and maintenance is re-imbursed by a toll, levied by public authority for the purpose. Every traveler has the same right to use it, paying the toll established by law, as he would have to use any other highway. *Commonwealth* v. *Wilkinson*, 16 Pick. 175. And see *Buncombe Turnpike Co.* v. *Baxter*, 10 Ired. 222; *Clarkville, etc., Turnp. Co.* v. *Atkinson*, 1 Sneed, 426; *Turnp. Co.* v. *Brosi*, 22 Penn. St. 29; *Louisville, etc., Turnp. Co.* v. *Ky., etc., Turnp. Co.*, 2 Swan (Tenn.), 282.

A plank road, unless there be a reservation to the contrary in the dedication implied in its charter, is a public highway. *Craig* v. *People*, 47 Ill. 487; *Benedict* v. *Goit*, 3 Barb. 459; *Plank Road Co.* v. *Thomas*, 20 Penn. St. 91. A road laid off by commissioners, under an order of a township board of trustees, who appoint an overseer of the same, is a public highway; and to obstruct it willfully is a misdemeanor. *State* v. *Davis*, 68 N. C. 297. Whether a *cul de sac* can or cannot be a public highway depends upon the common law, and not upon statute. It is an unsettled question in New York. *Hickok* v. *Plattsburgh*, 41 Barb. 130. But it is said that a *cul de sac* may be a good highway, if laid out by the proper authorities, or dedicated as such, and the dedication or laying out may be shown as in the case of any traveled way. *Holdane* v. *Coldspring*, 21 N. Y. (7 Smith) 474; *People* v. *Jackson*, 7

Mich. 432; *Bartlett* v. *Bangor*, 67 Me. 460; *Danforth* v. *Durell*, 8 Allen, 242; *Bateman* v. *Bluck*, 18 Q. B. 870; 14 Eng. Law & Eq. 69; *Young* v. *Cuthbertson*, 1 Macq. H. L. Cas. 455. A way may be a highway, although it lies wholly in one town, and is not connected with any county road. *Blackstone* v. *County of Worcester*, 108 Mass. 68.

In Pennsylvania, a State road is a highway laid out by the direct authority of the State, generally between distant places and through different counties, to supply a want felt by a large district of country which the diversity of local interest is not always willing to supply. *Penn Township Road*, 66 Penn. St. 461.

A reservation in a grant, of "the rangeway if ever wanted for a road," is not the reservation of a private way, but it is for a public highway, and the necessity for such highway is to be determined by the tribunals empowered to establish highways. *Morgan* v. *Palmer*, 48 N. H. 336. After a highway has been regularly laid out by competent authority, and a time fixed for the town to complete it, and it is subsequently actually opened to the use of the public, those who have the right to use it may presume that what was to be done by way of acceptance has been done, and that it has, in fact, become a public highway. *Drury* v. *Worcester*, 21 Pick. 44. Whether a way which has long been open for public use is a public highway or a town way, may, in the absence of a record, be shown by other evidence, which may tend to prove whether it was laid out by the authority of the town or by that of the county; and no conclusive presumption arises from the public use of the road, that it has been dedicated as a public highway. *Bigelow* v. *Hillman*, 37 Me. 52. But in general, from mere use and enjoyment, a public highway, and not a town way, will be presumed. *Stedman* v. *Southbridge*, 17 Pick. 162.

A road traveled for a long time is the highway, though not laid out as it was actually run by commissioners. *Taylor* v. *Bailey*, Wright (Ohio), 646. So, where the usual course of travel diverged from a portion of the highway as it was surveyed, and the owner of the land over which the highway was laid fenced up and appropriated that portion, and worked the course of the road as it was actually traveled, and the road was so used by the public as a highway, it was held that these facts amounted to a dedication to the public, and that a traveler would have the right to use the substituted portion as a highway, though it had not been so used continuously fifteen years. The grantee of such owner of the land could not maintain an action against one for using such substituted portion as a highway, at least until he revoked the license thus given by his grantor and himself. *Prouty* v. *Bell*, 44 Vt. 72.

The streets and alleys of a town are public highways. *Morris* v.

*Bowers*, Wright (Ohio), 749; *State* v. *Wilkinson*, 2 Vt. 480; *Adams* v. *Rivers*, 11 Barb. 390; *City of Cincinnati* v. *White*, 8 Peters, 431. And where a special statute of the legislature provides that all streets, roads and alleys within a village, which have been worked and improved by the trustees of the village, or the commissioners of highways, and are now used as such, shall be deemed public highways, the character of these streets, roads and alleys is to be determined by inquiring whether, as a matter of fact, any particular street or alley comes within the special provisions of such statute. *Hickok* v. *Plattsburgh*, 41 Barb. 130.

Every road is a highway which has been used as such for fifty years, and repaired within that time by the town. *Reed* v. *Northfield*, 13 Pick. 94. So, the use of a highway from forty to sixty years is presumptive evidence that it was properly laid out. *Hicks* v. *Fish*, 4 Mas. (C. C.) 310. Whether a road is public or private is a question for the jury if the evidence is conflicting. *Drake* v. *Rogers*, 3 Hill, 604. There may be a public road *de facto*, and the only person who can question the right to such a road is the owner of the land; but the owner can only be bound by a proceeding against him according to the law of the land, or by a user of twenty years, from which such proceedings will ordinarily be presumed. *The State* v. *Marble*, 4 Ired. 318.

A railroad established and existing under an act or charter of incorporation, like a turnpike or a plankroad, is a public highway; but only to be used in a different mode. *Rex* v. *Severn and Rye Railway Co.*, 2 B. & Ald. 646; *Beekman* v. *S. & S. R. R. Co.*, 3 Paige, 45, 74. See *March* v. *Ports., etc., R. R.*, 19 N. H. 372; *Taylor* v. *County Commissioners*, 13 Metc. 449. A railroad which legally forfeits its charter remains what it was, a public highway; the corporation loses its franchise, which passes to the State. *Erie, etc., R. R.* v. *Casey*, 26 Penn. St. 287.

Public bridges and ferries are public highways. A canal, when made by public authority, is in law a public highway, with the right of tolls attached. *Rex* v. *Kent*, 13 East, 220; *Rex* v. *Chelsea Water-works*, 5 B. & Ald. 156; *Rogers* v. *Bradshaw*, 20 Johns. 735; *Riddle* v. *Proprietors of Locks, etc.*, 7 Mass. 169.

All navigable rivers are public highways. See *Scott* v. *Wilson*, 3 N. H. 321; *Georgetown* v. *Alexandria Canal Co.*, 12 Peters, 91; *Corporation of Memphis* v. *Overton*, 3 Yerg. 389; *Gavit* v. *Chambers*, 3 Ohio, 495; *Wadsworth* v. *Smith*, 2 Fairf. 278; *Varick* v. *Smith*, 9 Paige, 547.

The making and improvements of public highways and the impo-

sition of taxes are among the ordinary subjects of legislation. The legislature of New York, therefore, has power to direct the construction of a highway in any town, to compel the creation of a town debt by the issue of its bonds, and to impose a tax upon the property of the town to pay the bonds without the consent of the citizens or town authorities. *People* v. *Flagg*, 46 N. Y. (1 Sick.) 401.

§ 3. **What are not highways.** A townway is not "substantially the same thing" as a highway, within the meaning of the statute limiting the right of second petition to two years from the date of reversal on appeal of the commissioners' decision. *Waterford* v. *Oxford County*, 59 Me. 450. And paved paths kept clear of snow by a city, and crossing a place of public resort, and connecting public streets with foot passage posts at the entrance are not ways "opened and dedicated to the public use," in the sense of the statute regulating liability for damages from defects, etc. *Oliver* v. *Worcester*, 102 Mass. 489; 3 Am. Rep. 485. A road only one mile long, and from ten to fifteen feet wide, leading from a public highway to a church, and used by the people of the neighborhood for sixty years in going to and from the church, and which connected with a country road leading to a mill in the neighborhood, and to a railroad station, but which had never been under the charge of an overseer nor worked as a public highway, is not a public highway so as to subject one to indictment for obstructing it. *State* v. *McDaniel*, 8 Jones' L. (N. C.) 284. See *Young* v. *Cuthbertson*, 1 Macq. H. L. Cas. 455. Streets dedicated by individuals to public use, but not adopted by the public local authorities, are not highways. *Niagara Falls, etc., Bridge Co.* v. *Bachman*, 66 N. Y. (21 Sick.) 261. See *Cook* v. *Harris*, 61 N. Y. (16 Sick.) 448; *Bryant* v. *Biddeford*, 39 Me. 193; *Guthrie* v. *New Haven*, 31 Conn. 308. Proof that a way has been used as a road for more than thirty years, incumbered all the time with gates and bars in the summer season without its ever having been fenced on its sides, is not sufficient to show that it is a public highway. *State* v. *Strong*, 25 Me. 297.

The use of land as a public common is very different from the use of a way as a public highway. The uses have but little in common, and it is not error for a court to refuse to charge a jury that, as a matter of law, the use of the land as a common rebuts all inference of a dedication of the way to the public for the purposes of a highway arising from the use of the same as a highway. The question is one of fact for the jury to determine from all the facts and circumstances of the case. *State* v. *Taff*, 37 Conn. 392.

§ 4. **Eminent domain.** The right of eminent domain exists in the government of the United States, and may be exercised by it within the

States so far as it is necessary to the enjoyment of the powers conferred upon it by the constitution. *Kohl* v. *United States*, 91 U. S. (1 Otto) 367. Ordinarily, as in the case of laying out of highways, provisions are made by general laws for the exercise of the right of eminent domain, and the necessity for its application in particular instances is left to the adjudication of certain designated officers or tribunals. But there can be no doubt that the power which can be thus delegated may, when occasion requires, be exercised by the legislature itself. In such case its decision is final; no discretion is given to the agents employed to make the appropriation and fix the compensation to be made; and neither the agents nor the courts have power to revise the decision. *Haverhill Bridge Proprietors* v. *Essex County*, 103 Mass. 120; 4 Am. Rep. 518. Courts have the right to determine whether the use to which private property is proposed to be appropriated is public in its nature or not; but, when the use is public, the judiciary cannot inquire into the necessity or propriety of exercising the right of eminent domain. That right is political in its nature, and to determine when it shall be exercised belongs exclusively to the legislative branch of the government. *Chicago, etc., R. R. Co.* v. *Town of Lake*, 71 Ill. 333; *Tyler* v. *Beacher*, 44 Vt. 649; 8 Am. Rep. 398. The legislature in exercising the right may ask the assistance of the courts but will not be ruled by them. *Water Works Co.* v. *Burkhart*, 41 Ind. 364. Where, in proceedings to condemn property for a public use, the question whether the taking of the same is necessary for such use is submitted to a jury, and the jury find on the issue, the court has no power to disregard the finding of the jury and make findings of its own. *Wilmington Canal, etc., Co.* v. *Dominguez*, 50 Cal. 505.

To authorize the taking of private property by legislative act, two things are necessary: *first*, the property must be taken for public use; and, *second*, provision must be made, except in urgent and extraordinary cases, for just compensation to the owner of the property taken. *Loughbridge* v. *Harris*, 42 Ga. 500; *Garrison* v. *City of New York*, 21 Wall. 196.

In a proceeding to condemn land for a right of way, the party exercising the power must strictly observe all the requirements of the statute under which he acts. *Chicago & Alton R. R. Co.* v. *Smith*, 78 Ill. 96; *County of Decatur* v. *Humphreys*, 47 Ga. 565; *Commissioners* v. *Beckwith*, 10 Kans. 603. And where a statute provides that commissioners shall be appointed before the appraisal of land to be condemned for public uses, the report of such commissioners is not conclusive, unless specially made so by statute. *Hannibal Bridge Co.* v. *Schubacker*, 49 Mo. 555.

Private property cannot be condemned to public use, without fair compensation being first made in money to the owner. *Paris* v. *Mason*, 37 Tex. 447. The compensation should be ascertained under the laws in force at the time the proceedings are begun. *Emerson* v. *Western Union R. R. Co.*, 75 Ill. 176. And the amount of compensation is the fair value of the land as a whole, to be estimated as of the time the proceedings were begun. *Burt* v. *Merchants' Ins. Co.*, 115 Mass. 1; *S. & C. R. R. Co.* v. *Galgiani*, 49 Cal. 139. In such cases, no contracts between the owners of different interests in the land can affect the right of the government to take the land for the public use, or oblige it to pay by way of compensation more than the entire value of the land as a whole. *Burt* v. *Wigglesworth*, 117 Mass. 302.

Private property cannot be appropriated to public uses, *in invitum* until the record shows that an attempt has been made to purchase the same of the owner, unless in the course of the proceedings he has waived his objections thereto. *United States of America* v. *Reed*, 56 Mo. 565.

Proceedings to condemn lands for the use of a corporation, in virtue of the right of eminent domain, do not involve the question of title to the land. The petitioners must ascertain the true owner of the land that they wish to acquire, and make him a party; and the petition assumes his title. He, in his turn, is not called upon to prove his title; it stands conceded; the commissioners have no jurisdiction of the question of title, only of that of damages. *Peoria, etc., R. R. Co.* v. *Laurie*, 63 Ill. 264.

Compensation need not precede the actual appropriation of lands for a public use by the State, or by a municipal corporation by State authority. It is sufficient if an adequate remedy is provided, which the party may resort to on his own motion to recover compensation. In this respect there is a distinction between a taking by a public municipal corporation, and by an individual or private corporation. And a peculiar benefit derived by the owner from the improvement in respect of which he may lawfully be compelled to contribute toward the costs and expenses, may be taken as part of his compensation for lands taken, and the legislature may constitutionally provide that the assessment for benefits may be set off in an action by the owner to recover the assessment for the damages for the taking of lands. *Lowerce* v. *City of Newark*, 38 N. J. L. 151. See *White* v. *Nashville, etc., R. R. Co.*, 7 Heisk. (Tenn.) 518.

There is no principle which forbids that property acquired by a corporation in virtue of the right of eminent domain, or any other property belonging to it, should be taken from it by another exercise of

the same right. *Chicago, etc., R. R. Co.* v. *Town of Lake*, 71 Ill. 333; *Central City Ry. Co.* v. *Fort Clark Ry. Co.*, 81 id. 523; *Matter of N. Y. C. R. R. Co.*, 63 N. Y. (18 Sick.) 326. The legislature, in the exercise of the power of eminent domain, may devote land already appropriated to a particular public use, to a different and inconsistent use. But in such case the legislative intent must appear by express words or by necessary implication. And, if possible, the former use must not be defeated by the subjection of the land to the additional use. *Little Miami, etc., R. R. Co.* v. *City of Dayton*, 23 Ohio St. 510. Such implication arises only when requisite to the enjoyment of the powers expressly granted, and can be extended no further than such necessity requires. *Hickok* v. *Hine*, 23 Ohio St. 523; 13 Am. Rep. 255.

The right to the use of a highway, of persons not owning the land over which it passes, is not a vested right of property, which the legislature cannot take without compensation. *People* v. *Ingham County*, 20 Mich. 95.

Taking for a way land already used for that purpose, takes all things existing upon it and adapted to its use as a way, such as flagstones, gravel, bridges, culverts, etc., so that the appraisal in such case should be of the land with all these incidents of its condition. *Ford* v. *County Comm'rs*, 64 Me. 408.

After the State has duly acquired lands, by eminent domain, for a canal, the legislature may change the mode of using them, as by appropriating them for a highway, without its causing a reversion to the former owner. *Malone* v. *City of Toledo*, 28 Ohio St. 643. But if an easement only is taken, the property may, when such easement ceases, revert to the owner. *Water Works Co.* v. *Burkhart*, 41 Ind. 364. Condemnation of a quarry for the use of a turnpike passes the use only and not the fee. *Morris* v. *Schollsville, etc., Turnp.*, 6 Bush (Ky.), 671.

When the act for condemning land for a public highway requires the money allowed to a land-owner for damages to be set apart in the treasury by the supervisors for the owner, the land is not taken for public use, until it is so set apart. An order of the supervisors awarding the damages allowed, payable from the current expense fund of the county, is not a taking of the land for public use. And a tender to the land-owner, of the damages allowed, made after such order, is of no avail. *Murphy* v. *De Groot*, 44 Cal. 51.

§ 5. **Of title by grant.** A right of way of necessity can only arise by grant, express or implied. *Proctor* v. *Hodgson*, 10 Exch. 824, 828, *note;* 29 Eng. Law & Eq. 453; *Ledyard* v. *Ten Eyck*, 36 Barb. 102.

It is a well-established principle that highways may have a legal existence from immemorial usage. Long occupation and enjoyment, unexplained, will raise a presumption of a grant, not only of an easement, but of the land itself, and not only of a grant, but of acts of legislation and matters of record. But this presumption is predicated upon the existence of some title or right, which is the subject of the grant. No one is presumed to have granted an easement in the right of passage to the public over his land, when that right is in the public to the fullest extent. *State* v. *Wilson*, 42 Me. 9.

§ 6. **Title by dedication.** A highway may be created by the owner's dedication or donation of his land therefor, and the acceptance or recognition thereof by the proper public authorities (*State* v. *Atherton*, 16 N. H. 203; *Noyes* v. *Ward*, 19 Conn. 250; *Trustees* v. *Otis*, 37 Barb. 50; *State* v. *Wilson*, 42 Me. 9; *Smith* v. *State*, 3 Zabr. [N. J.] 130; *Holcroft* v. *King*, 25 Ind. 352); to constitute a public highway by dedication, there must not only be a setting apart and a surrender to the public use of the land by the owner, but, also, an acceptance and formal opening by the proper authorities, or a user. *Niagara Falls Susp. Bridge Co.* v. *Bachman*, 66 N. Y. (21 Sick.) 261; *Mathis* v. *Parham*, 1 Tenn. Ch. 533; *Princeton* v. *Templeton*, 71 Ill. 68; *Williams* v. *N. Y., etc., R. R. Co.*, 39 Conn. 509; *Remington* v. *Millerd*, 1 R. I. 93; *Fulton Village* v. *Mehrenfeld*, 8 Ohio St. 440. A dedication does not rest on the idea of a grant, as there may be a dedication by any act of the owner showing his intent, though only to be accepted and used *in futuro*. *Jersey City* v. *Morris Canal, etc., Co.*, 1 Beasl. (N. J.) 547. The whole matter of dedication and acceptance rests on the principles of the common law in which it originated. These principles authorize the gift, estop the giver from recalling it, and presume an acceptance by the public, where the highway is shown to be of common convenience and necessity, and therefore beneficial to them. *Guthrie* v. *New Haven*, 31 Conn. 308. In other words, such dedication rests on the doctrine of *estoppel*. *Connehan* v. *Ford*, 9 Wis. 240; *State* v. *Wilson*, 42 Me. 9; *State* v. *Atherton*, 16 N. H. 203. But the acts and declarations of the landowner must be unmistakable in their purpose and decisive in their character, showing the intent to dedicate the land absolutely and irrevocably to the public use. *Niagara Falls Susp. Bridge* v. *Bachman*, 66 N. Y. (21 Sick.) 261; *David* v. *New Orleans*, 16 La. Ann. 404. The mere acting so as to lead persons to the supposition that the way is dedicated will not amount to a dedication, if there be any agreement which explains the transaction, but otherwise, if not explained. *Marcey* v. *Taylor*, 19 Ill. 634; *People* v. *Jones*, 6 Mich. 176. The

fact that in a town plat one block appears unsubdivided and without number or marks, does not constitute a dedication to public purposes, but a statement by the owners that it is to be a public square may amount to a dedication. *Ruch* v. *City of Rock Island*, 5 Biss. 95. Where ground has been set apart as a private alley, or conveyed to adjoining property owners as a private alley, although used by the public as a pass-way without hindrance, such acts do not amount to a dedication to the public, as the intent to dedicate is wanting. *Hemingway* v. *Chicago*, 60 Ill. 324. Dedication as a private way, or any length of user as such, will not be sufficient to establish dedication by the owner to the public and an acceptance by the public. *State* v. *Tucker*, 36 Iowa, 485. And the maintenance of gates and bars across a traveled way indicates an absence of intention to dedicate the way to public use. *State* v. *Green*, 41 Iowa, 693.

It is essential to a dedication of property to public use that it is to be forever and irrevocable. *San Francisco* v. *Canavan*, 42 Cal. 541. And it must be for the use of the public at large; there can be no dedication, properly speaking, to private uses. *Methodist Episcopal Church* v. *Hoboken*, 33 N. J. (4 Vr.) 13.

A dedication of land for a highway may be valid without any lapse of time or length of user (*Ogle* v. *Philadelphia, etc., R. R. Co.*, 3 Houston [Del.], 267); although the owner's intention to dedicate was formed after the public commenced using the way (*Havana* v. *Biggs*, 58 Ill. 483); and although the land dedicated forms only part of the highway (*Havana* v. *Biggs*, 58 Ill. 483); and so, although only a public foot-way is created (*Tyler* v. *Sturdy*, 108 Mass. 196); and the dedication may be valid, although at one end the way may have no outlet, or may terminate in a private way. *People* v. *Van Alstyne*, 3 Abb. (N. Y.) App. Dec. 575; *Bartlett* v. *Bangor*, 67 Me. 460.

A dedication once made cannot be recalled, and the intention of the owners at the time is to be considered, not their intention at any subsequent time. *Ruch* v. *City of Rock Island*, 5 Biss. (C. C.) 95. But there can be no dedication to the public of land as a highway, with the reservation of a right of making cuts through the land when wanted for the purposes of drainage. *Rex* v. *Leake*, 2 N. & M. 583; S. C., 5 B. & Ad. 469.

Where land is appropriated by dedication to the purpose of a highway, the public acquires only the right of way, which is a mere easement. The fee remains in those who made the dedication, and they may maintain an action against persons improperly appropriating the highway, either to abate a nuisance erected thereon, or to recover dam-

ages therefor. *Knox* v. *New York*, 55 Barb. 404; S. C., 38 How. 67. See *Taylor* v. *Danbury Public Hall Co.*, 35 Conn. 430.

There is a difference between a common-law dedication, and a dedication under the statute of Illinois; the one vests the legal title to the ground set apart for public purposes in the municipal corporation, in trust for the public, while the other leaves the legal title in the original owner, charged, however, with the public rights which it would have if the fee was in the corporation. But the rights of the public are the same under both. *Chicago, etc., R. R. Co.* v. *Joliet*, 79 Ill. 25. No presumption of dedication of uncultivated land of the United States for a highway can be raised from its use as such. *Phipps* v. *State*, 7 Blackf. (Ind.) 512.

§ 7 **Who may dedicate.** No one but the owner of land or his duly authorized agent can dedicate it to public uses. *Bushnell* v. *Scott*, 21 Wis. 451; *Bangan* v. *Mann*, 59 Ill. 492; *Pearsall* v. *Post*, 20 Wend. 442; *Wood* v. *Veal*, 5 Barn. & Ald. 454; *Baxter* v. *Taylor*, 1 Nev. & M. 13. A mere squatter upon government land has no such power. *Gentleman* v. *Soule*, 32 Ill. 271. And an Indian, under disability to convey his land without the consent of the secretary of the interior, cannot of himself make a valid dedication of a portion of said lands, to the public for use as a highway; nor can any dedication be presumed as against him by any user of the public of the highway, or from his acts and conduct in reference thereto. *State* v. *O'Laughlin*, 19 Kans. 504. Dedication may, however, be made by a corporation, provided such an act be not inconsistent with the limitations of its charter and the purpose for which it was incorporated. *Great Surry Canal Co.* v. *Hall*, 1 Man. & Gr. 392; *Mayor, etc., of Macon* v. *Franklin*, 12 Ga. 239. Thus, a railroad company may dedicate land for a public highway. *Williams* v. *New York, etc., R. R. Co.*, 39 Conn. 509. A trustee may dedicate, when compatible with the scope and nature of his trust. *Rex* v. *Leake*, 5 B. & Ad. 469. Dedication may be presumed against a married woman. *Schenley* v. *Commonwealth*, 36 Penn. St. 29; *Ward* v. *Davis*, 3 Sandf. (N. Y.) 502. And where the owners of the equitable estate make a dedication, their trustee, holding but a legal title for their use, is bound to respect it. *Williams* v. *First Presb. Soc. in Cincinnati*, 1 Ohio St. 478.

The owners of a farm cannot, by any plat they may make, dedicate to the public, as a street, a strip of land along the edge of the farm, the title to the right of way wherein is held by a railroad company. *Detroit* v. *Detroit, etc., R. R. Co.*, 23 Mich. 173. And where a dedication of a portion of certain lots of land for a public highway was made by the original owners, and was never recalled, it was held that

subsequent purchasers of the lots took the fee subject to the easement, and that until the dedication was revoked by the original owners, the public had the right to accept the dedication and open the road without compensation to the then owners of the lots. *Baldwin* v. *Buffalo*, 35 N. Y. (8 Tiff.) 375.

A highway already dedicated to the public, which it is the duty of a city to repair, cannot be dedicated by the city to the town. The easement being already in the public, there is nothing which the city can dedicate. The transfer of its duty to repair can only be made by contract. *Guthrie* v. *New Haven*, 31 Conn. 308.

The owner of land, or his authorized agent, can plat and lay out a town so as to pass to the public the perpetual use of portions of the land for streets and public grounds, and when such plat is made out, acknowledged and recorded in conformity with the statute, it operates as a sufficient conveyance of the streets and public grounds to the public use. When made out and recorded in a county other than that in which the land is situate, it does not operate as a dedication. It must be made by the person who owns the land at the time it is made, or his authorized agent, and in order to divest the title of the proprietor, the formalities prescribed in the statute are essential. Deeds referring to a plat, but given before the grantor acquired title, do not bind him as an act of dedication. But an unequivocal recognition of the map after purchase would operate as an affirmance of the original intention of dedication, and give it full force and effect. *Nelson* v. *City of Madison*, 3 Biss. (C. C.) 244. See *Trustees of Watertown* v. *Cowen*, 4 Paige, 510; *Banks* v. *Ogden*, 2 Wall. 57.

§ 8. **How dedicated.** To constitute a dedication, the owner of the land must intend to make the gift, and it must be accepted by the public authorities. *Princeton* v. *Templeton*, 71 Ill. 68; *Hayden* v. *Stone*, 112 Mass. 346; *Town of Derby* v. *Alling*, 40 Conn. 410; *Fairfield* v. *Morey*, 44 Vt. 239; *Portland* v. *Whittle*, 3 Oreg. 126. Any act of the owner of the soil clearly indicating an intention to dedicate is sufficient. The intention may be manifested by writing, sealed or unsealed, by parol, or by acts inconsistent with any inference except such intention. Proof of the *animus dedicandi* may be by circumstances and may rest *in pais*. The use of the way by the public with the knowledge and assent of the owner of the soil will be considered evidence of dedication; and when such use extends through a long series of years, the *animus dedicandi* is presumed. When the owner of the soil so long acquiesces in the use of the way, having knowledge thereof, he is estopped to deny his prior dedication. *Wilson* v. *Sexon*, 27 Iowa, 15; *Conuchan* v. *Ford*, 9 Wis. 240. See *Hol-*

*dane* v. *Coldspring, etc.*, 21 N. Y. (7 Smith) 474; *Alves* v. *Henderson*, 16 B. Monr. 131; *City of Chicago* v. *Wright*, 69 Ill. 318; *Cemetery Ass.* v. *Meninger*, 14 Kan. 312. Making and recording a plat of land laid out in city lots and streets, and selling lots by reference to it, and as bounded on such street, is a dedication of the land covered by the streets to that use. *Shanklin* v. *Evansville*, 55 Ind. 240; *Barney* v. *Mayor, etc., of Baltimore*, 1 Hughes, 118; *Hawley* v. *Baltimore*, 33 Md. 270; *Bissell* v. *N. Y., etc., R. R. Co.*, 23 N. Y. (9 Smith) 61; *Woodyer* v. *Hadden*, 5 Taunt. 125.

But a permissive use by the public, for any length of time, of a way of access laid out by the owner to a mill or store, does not prove a dedication or an acceptance. It is but a license which may be revoked at the pleasure of the owner. Nor will mere use by individual members of the community prove acceptance by the public; nor will unauthorized repairs by a street commissioner, whether sufficient to raise a statutory estoppel against the city or not. *White* v. *Bradley*, 66 Me. 254.

A mere partition of land by commissioners, without a specific assignment of any part to use as a street, is not an act of dedication. *McCormick* v. *Mayor, etc.*, 45 Md. 512. And where the owner of a lot of land abutting on a public street subdivided the same into lots, and between the street and the lots, as marked on the plat, there was a gore or strip of land separated from the street by a dotted line, it was held that this was not a dedication of the gore to the public as a part of the street. *Princeton* v. *Templeton*, 71 Ill. 68.

A mere user of land for a limited time cannot fairly raise the presumption of a dedication. *City of San Francisco* v. *Scott* 4 Cal. 114. And the mere consent of a party, that a road be made over his land, it not being surveyed or laid out, is no dedication of any particular line. *Scott* v. *State*, 1 Sneed (Tenn.), 629.

The mere survey and platting of a road by a county surveyor, under the direction of highway commissioners, does not have the effect to establish it as a public highway; such a proceeding is designed only to ascertain the courses and distances of a road claimed to be already established and leaves the proof of its existence precisely as it was before. *Gentleman* v. *Soule*, 32 Ill. 271.

There can be no dedication of a way to the public for a time limited, certain or uncertain; if dedicated at all it must be dedicated in perpetuity. Neither can the public by non-user release their rights. *Dawes* v. *Hawkins*, 8 C. B. (N. S.) 848; 10 id. 875.

To constitute a dedication of lands under a statute which will operate to divest the owner's title, the steps prescribed by the statute must

have been substantially taken; the courts cannot adjudge the owner's lands to have been granted by him, on the ground that what he has done, though different from the requirements of the statute, is equivalent to them. *Downer* v. *St. Paul, etc., R. R. Co.*, 22 Minn. 251.

A dedication by acts *in pais*, being usually uncertain of proof, is no defense against a proceeding by the proper authorities to condemn the property to public use for the same purpose. *Rogers* v. *City of St. Charles*, 54 Mo. 229.

§ 9. **Acceptance.** To render a dedication to public use binding there must be something equivalent to an acceptance on the part of the public. *Dodge* v. *Stacy*, 39 Vt. 558; *Sandford* v. *Meriden*, 52 Miss. 383; *Muzzey* v. *Davis*, 54 Me. 361; *Gentleman* v. *Soule*, 32 Ill. 271; *Curtis* v. *Hoyt*, 19 Conn. 154. Acceptance is necessary to charge municipal authorities with liability for the defective condition of a highway upon land dedicated for that purpose. But such acceptance may be inferred from general and continued user. *Manderschid* v. *Dubuque*, 29 Iowa, 73; 4 Am. Rep. 196. But *it seems* an acceptance by the public authorities for public uses is not essential to conclude the owner from his power of retraction, when his intention to permanently abandon his property and dedicate it to public use is once unequivocally manifested. In that event the right of the public to appropriate the lands to public use, at any future time when their wants or convenience require it, immediately attaches. *M. E. Church* v. *Hoboken*, 33 N. J. L. (4 Vr.) 13.

The platting of lands into blocks and streets is but an offer to dedicate the lands indicated as streets, and an acceptance on the part of the public is essential to make such streets public highways; and where the public authorities do not within a reasonable time accept such offer to dedicate, the proprietor may again take possession and revoke his offer. *Field* v. *Manchester*, 32 Mich. 279; *Niagara Falls Susp. Bridge Co.* v. *Bachman*, 66 N. Y. (21 Sick.) 261; *Parsons* v. *Atlantic University*, 44 Ga. 529. But the mere fact that the public do not use a street which has been dedicated to them for that purpose does not authorize the party dedicating it to resume possession of the land. *Prince* v. *McCoy*, 40 Iowa, 533.

User by the public constitutes a sufficient acceptance of a dedication of land for the purposes of a way, to vest a right of way over the land in the public. *Holdane* v. *Trustees of Cold Spring*, 23 Barb. 103; S. C. affirmed, 21 N. Y. (7 Smith) 474; *Manderschid* v. *Dubuque*, 29 Iowa, 73; *Green* v. *Canaan*, 29 Conn. 157; *Buchanan* v. *Curtis*, 25 Wis. 99; 3 Am. Rep. 23. And a town's acceptance may be shown

by their express vote, or by their recognition in any manner of their obligation to repair. *State* v. *Atherton*, 16 N. H. 203.

Formal action by the common council of a city is not necessary to constitute an acceptance of a bridge, such as will bring the city under obligation to keep it in repair. Making repairs and exercising municipal control over the bridge may show an acceptance. *Shartle* v. *Minneapolis*, 17 Minn. 308.

An acceptance of a highway dedicated to the public may be made at any time, provided the gift continues and the tender is not withdrawn by the owner of the fee before an actual acceptance. *Simmons* v. *Cornell*, 1 R. I. 519. A reasonable time is to be allowed for such acceptance. In the case of a city street opened for settlement upon it, a reasonable time would be the time required for the settlement and occupation of the adjoining lands. *Guthrie* v. *New Haven*, 31 Conn. 308. But an owner of land in a village, who opens a street over it, and dedicates it to the public use, can revoke the dedication, if, after a lapse of five years, the village authorities have done no act which is construable as an acceptance of such dedication, such as opening or working or improving the same. *Lee* v. *Sandy Hill*, 40 N. Y. (1 Hand) 442.

An entry upon a plat of an addition to a city, duly laid out, recorded and filed, conveying the streets and alleys therein shown, to a county for the use of the public, is ineffectual to deprive the city of, or confer on the county any rights in or control over such streets and alleys. The acceptance of such a dedication may well be presumed, after a lapse of ten years, and an action by the city to enforce its rights in such streets and alleys is no light proof of such acceptance. *Des Moines* v. *Hall*, 24 Iowa, 234.

A surveyor has no authority, by repairs or otherwise, to accept a way dedicated to the public, and render the town liable to indictment for its non-repair as a highway. *State* v. *Bradbury*, 40 Me. 154. There cannot be a dedication of a highway, with a reservation to destroy or to resume it. *Mercer* v. *Woodgate*, 10 B. & S. 833; L. R., 5 Q. B. 26.

§ 10. **Limits of the dedication.** Where there is no other evidence of dedication than mere user by the public, the presumption of dedication is not necessarily limited to the traveled path, but may be inferred to extend to the ordinary width of highways, or, if the road be inclosed with fences, to include the entire space so inclosed. See *Rex* v. *Wright*, 3 B. & Ad. 681; *Cleveland* v. *Cleveland*, 12 Wend. 172; *Hannum* v. *Belchertown*, 19 Pick. 311; *Simmons* v. *Cornell*, 1 R. I. 519; *Lawrence* v. *Mount Vernon*, 35 Me. 100. As where a highway running eastwardly forked into two branches, one passing north, and the other south of a blacksmith's shop, and both then entering nearly at right-

angles into another highway; and the blacksmith's shop and the fences on the south side of the southern branch, and on the north side of the northern branch of the first highway, had stood for more than twenty years, it was held that by virtue of the statute, in the absence of other evidence of the limits of this highway, the fences and shop must be deemed its boundaries, and the triangle of land between its branches, except the shop, part of the highway. *Morton* v. *Moore*, 15 Gray, 573.

A road which, by twenty years' use, becomes a highway, is of no established width by law, but the width as used at the end of twenty years cannot be intruded upon. *Epler* v. *Niman*, 5 Ind. 459.

Lands dedicated to the public as a highway are by law subject only to the use of the public as such. The fee remains in the owner of the adjacent property, of which it is a part, subject to the public easement. It is true that in some States trees and the soil in a highway may be used in the improvement of it, but the public has no title to a mine, a bed of peat, or turf, or gravel found therein. *Cuming* v. *Prang*, 24 Mich. 514. *Ante*, pp. 61, 62.

Where the owner of land surveys, maps, and lays out such lands into lots, numbering them with streets, designated, named, and put down on the map as between him and the grantee of a lot bounded on one of the designated streets, his conveyance is *per se* a dedication of the street to the use of his grantee as a street. *Taylor* v. *Hepper*, 5 N. Y. Sup. Ct. (T. & C.) 173; S. C., 2 Hun, 646; 62 N. Y. (17 Sick.) 649.

The dedication of land for the purpose of a village or city street is to be understood as made and accepted with the expectation that it may be required for other public purposes than those of passage and travel merely; and that, under the direction and control of the public authorities, it is subject to be appropriated to all the uses to which such streets are usually devoted, as the wants or convenience of the people may render necessary or important; and one of these uses is the construction of sewers under them. The custom of laying sewers under such streets must be assumed to be had in view when such a way is dedicated; and the act of dedication is a waiver of any claim by the owner to compensation for damages on account of such a use of the street by the public. *Warren* v. *Grand Haven*, 30 Mich. 24. See *Milhau* v. *Sharpe*, 15 Barb. 193, 210; *Blyth* v. *Birmingham Water Works Co.*, 11 Exch. (Hurlst. & Gord.) 781.

There may be a dedication of a way to the public for a limited purpose, as for a foot way; but there cannot be a dedication to a limited part of the public, as to a parish; and such a partial dedication is simply

void, and will not operate in law as a dedication to the whole of the public. *Pool* v. *Huskinson*, 11 M. & W. 827. Neither can there be a dedication of a way for a time limited, certain or uncertain. If dedicated at all it must be dedicated in perpetuity. Nor can the public, by non-use, release their rights. *Dawes* v. *Hawkins*, 8 C. B. (N. S.) 848; S. C., 7 Jur. (N. S.) 262; 4 L. J. (N. S.) 288; 29 L. J. (C. P.) 343.

But a highway may be dedicated to the public, subject to a pre-existing right of user by the occupiers of adjoining land, for the purpose of depositing goods thereon. *Morant* v. *Chamberlain*, 6 H. & N. 541; S. C., 30 L. J. Exch. 299. And where an erection or excavation exists upon land, and the land on which it exists, or to which it is contiguous, is dedicated to the public as a highway, the dedication must be taken to be made to the public and accepted by them, subject to the inconvenience or risk arising from the existing state of things. *Fisher* v. *Prowse*, 2 B. & S. 770; S. C., 8 Jur. (N. S.) 1208; 31 L. J. (Q. B.) 212.

§ 11. **Evidence or presumption of dedication.** A dedication of the right of way for a highway may be established by a grant or written instrument, or by the acts and declarations of the owner of the premises. It may be inferred from long and uninterrupted user by the public, with the knowledge and consent of the owner; but there must be a clear intent shown to make the dedication; the evidence should be clear, either of an actual intent so to do, or of such acts and declarations as will equitably estop the owner from denying such intent. *McIntyre* v. *Storey*, 80 Ill. 127; *Cook* v. *Harris*, 61 N. Y. (16 Sick.) 448; *Robertson* v. *Wellsville*, 1 Bond, 81; *Grinnel* v. *Kirtland*, 6 Daly (N. Y.), 356; *Morrison* v. *Marquardt*, 24 Iowa, 35; *State* v. *Atherton*, 16 N. H. 203; *Chapin* v. *State*, 24 Conn. 236; *Stone* v. *Jackson*, 32 Eng. L. & Eq. 349; *Pool* v. *Huskinson*, 11 M. & W. 827. But the fact that a road has been used by the public for a considerable length of time, with the knowledge of the owners of the land, does not create a presumption of dedication, unless such use be also with the consent of such owners. *Sullivan* v. *State*, 52 Ind. 309; *Quinn* v. *State*, 49 Ala. 353; *Jackson* v. *State*, 6 Coldw. (Tenn.) 532. And where the acts which are relied upon, on the part of the city, to show the dedication of land as a highway, are of a doubtful character, the facts that individual ownership was asserted, and exclusive possession taken the first year after the alleged dedication, and that the city had for twenty-eight years both positively recognized and passively acquiesced in such a construction of the plat as excluded the idea of dedication, must be considered as conclusive against the dedication. *Peoria* v. *Johnston*, 56 Ill. 45. See *Hougham* v. *Harvey*, 33 Iowa, 203; *Clark* v. *Peckham*, 9 R. I. 455. But proof that the use of a public way has been general, uninterrupted

and continuous will warrant a jury in inferring that it has been laid out, appropriated, or dedicated to the public. *Holt* v. *Sargent*, 15 Gray, 97; *Winterbottom* v. *Lord Derby*, L. R., 2 Exch. 316; *Regina* v. *Petrie*, 30 Eng. Law & Eq. 207; *Connehan* v. *Ford*, 9 Wis. 240; *Stacey* v. *Miller*, 14 Mo. 478. But it does not in and of itself justify the court in assuming the fact of a dedication. *Penquite* v. *Lawrence*, 11 Ohio St. 274. And a want of power to dedicate is conclusive against all evidence of dedication. *State* v. *O'Laughlin*, 19 Kans. 504.

A dedication of streets and public grounds to the public may be shown, by acts resting on parol, but they must be of such a public and deliberate character as makes them generally known, and not of doubtful intention. *Lownsdale* v. *Portland*, 1 Oreg. 397; *Brown* v. *Jefferson*, 16 Iowa, 339.

To prove a dedication by user, the user by the public must have been adverse and exclusive of the use and enjoyment of the property by the proprietor, and not a mere use by the public under, and in connection with its use by the owner in any manner desired by him. *Talbott* v. *Grace*, 30 Ind. 389; *Beall* v. *Clore*, 6 Bush (Ky.), 676. Where a roadway was opened through certain premises by digging ditches on either side, and without the knowledge of the owner, who was absent from the State, but who afterward permitted it to be constantly used as a highway by the public, it was held that his failure to inclose the premises, or to institute actions of trespass against parties so using it, could not be regarded as conclusive evidence of an intention to dedicate. *Kelly* v. *Chicago*, 48 Ill. 388. And the owner of property who voluntarily leaves a space in front of his building open for a foot-way, occupied in part by his cellar door, for a period of many years, may nevertheless extend his building upon his own ground to the line of the street whenever he chooses to do so. There is no dedication to the public. *Duncan* v. *Hanbest*, 2 Brewst. (Penn.) 362. See *Morse* v. *Ranno*, 32 Vt. 600.

An ancient highway over a common or down was without authority or interference from the owner of the soil, diverted by an adjoining proprietor who substituted for it a new road which was used by the public for more than twenty years. After the lapse of that period, the original road was re-opened to the public, and the then owner of the soil over which the substituted road passed, built a wall and planted trees across the road which had been so substituted. In an action against the defendant for pulling down the wall and cutting down the trees, it was held that the above facts afforded no reasonable evidence of a dedication of the substituted road to the public, the public user thereof being referable to the right of the public to deviate on to the ad-

joining land whenever the owner of the soil illegally stops a highway, or suffers it to become founderous. *Dawes* v. *Hawkins*, 8 C. B. (N. S.) 848; 10 id. 875.

Where it is proved that parties preparing a plat of a town for acknowledgment and record intended to lay out a certain strip of ground as an alley, and thus dedicate the same to the use of the public, and took certain steps to carry that intention into effect, very slight testimony will sustain a finding that such dedication was in fact made. *Giles* v. *Ortman*, 11 Kans. 59. So a dedication of lands for the continuation of a village street will be inferred, because on the plat of the village certain lots fronted southward, and some of them would be inaccessible without such street, although there was no other indication by words or lines that the streets were so continued, and although in some other cases on the same plat, the side of a street opposite to an exterior block or tier of blocks was indicated by a line. *Warden* v. *Blakely*, 32 Wis. 690. But where the owner intending to dedicate to the public opened and fenced, and allowed to be mapped on a published map, as a highway, a strip of land leading from a highway, but not connecting with any road at the other end, and be allowed to be freely used during two years as much as was necessary in going to and from the private property at the further end, and it appeared that it was opened with a view thereafter to sell as house lots the abutting land, it was held that there was no conclusive dedication by the owner, but that the facts rather showed an intention to dedicate after he had sold his lots, which had not been done, that there was no acceptance by the public, because there was no formal acceptance by an authorized body, and there could be no acceptance by public user as a highway, of a court leading only to the owner's land, and that of one other person who had acquired no private right of way over it. *Holdane* v. *Coldspring*, 21 N. Y. (7 Smith) 474.

Where the owner of a tract of land lays it off for a town, publishes a map of the lots, streets and lanes, and sells out the lots on a street to others, and the town is established as designated in the map, the owner of the land will be presumed to have dedicated the streets and lanes to the public, and if one of them is diverted from the purposes designated, as if under a sale from the city authorities, a house is built on land that is part of the street, this does not authorize the original owner of the tract to sue in ejectment for the land so built upon. The title of the land is in the public, for the uses designated, so long as the town exists. If the street is abandoned by the public, *prima facie*, the reversion would be in the owners of the abutting lots, unless the injured grantor had, in express terms, reserved the right to himself in his deed

conveying the lots, or in his act of dedication. *Bayard* v. *Hargrove*, 45 Ga. 342; *Evansville* v. *Evans*, 37 Ind. 229; *Yost* v. *Leonard*, 34 Iowa, 9; *Briel* v. *Natchez*, 48 Miss. 423; *Wiggins* v. *McCleary*, 49 N. Y. (4 Sick.) 346; *McDunn* v. *Des Moines*, 34 Iowa, 467.

Where the proposition of a land-owner, that if the route of a highway, which he believed legally established, should be so changed as to run along the line of his land he would give the right of way, was accepted, and the road so changed was used by the public for several years, and expensive improvements made thereon, it was held that he could not resume possession of the dedicated route, upon ascertaining that the old road was not a legal highway. *Marratt* v. *Deihl*, 37 Iowa, 250.

Where a village is laid out upon paper, as one entire act, the dedication of all the streets to the public is entire, and when the public act upon such dedication, the acceptance of part will be construed as an acceptance of the whole. *Town of Derby* v. *Alling*, 40 Conn. 410.

Where a bridge is built by private means and dedicated to public use, its acceptance may be proved by its appropriation to the specific use by the public officers having control of the easement; by the commissioners of highways recognizing and controlling it as they do other highways, and repairing it and having obstructions removed; and by various other acts which indicate recognition that it is exclusively for public use. *Rutland* v. *Dayton*, 60 Ill. 58.

The presumption of dedication, based upon use by the public for twenty years, is not defeated by the fact that the way was over an open prairie, and that the track of the travel varied many rods north and south; especially where the owner of the land on both sides of the way, of whom the defendant purchased, had shown his understanding as to the limits of the highway by fencing, and referring to these limits in his deed of the property. *Wyman* v. *State*, 13 Wis. 663. See *Reg.* v. *Eastmark Tything*, 11 Q. B. 877; S. C., 12 Jur. 332; 17 L. J. (Q. B.) 877; 3 Cox (C. C.), 60.

Much stronger evidence of a dedication by the owner, or prescriptive right by the public, will be required to establish the existence of a neighborhood, local, or timber-road than of a thoroughfare, or part of an acknowledged highway between towns, or leading to a town, and as such, constantly traveled. *Onstott* v. *Murray*, 22 Iowa, 457; *Harding* v. *Jasper*, 14 Cal. 642.

§ 12. **Rebutting presumption of dedication.** The most common method adopted to rebut the presumption of dedication is the placing of a gate or bar across the road, to open and shut at pleasure. *Commonwealth* v. *Newbury*, 2 Pick. 51; *State* v. *Strong*, 25 Me. 297; *Car-*

*penter* v. *Gwynn*, 35 Barb. 395; *Proctor* v. *Lewiston*, 25 Ill. 153. But the fact that there is such a gate or bar is not entirely conclusive, for the road may have originally been granted, reserving a right of keeping a gate or bar across to prevent cattle straying. *Davies* v. *Stephens*, 7 Carr. & Payne, 570. Where the plaintiff applied to have an avenue laid out as a public highway, but withdrew his application and no proceedings were had on it, and he then graded the road at his own expense and maintained a gate at each end, it was held that he had shown a clear intention not to dedicate it to the public. *Carpenter* v. *Gwynn*, 35 Barb. 395.

In a case where a street had been made across an inclosed field, and soon after the houses were finished, a bar had been placed across the street to prevent carriages from passing, but had soon been knocked down, since which time the street been used as a thoroughfare, it was held that putting up the bar rebutted the presumption of dedication, which, to bind the land-owner, must have been made openly and with a deliberate purpose; and that in this case, the street was to be considered only as a way for the use of the tenants inhabiting on each side of it. *Roberts* v. *Karr*, 1 Camp. 262, *n*. So where originally a gate had been erected across the way, but for twelve years had not been there, the jury under the direction of the judge found that there was no dedication. *Lethbridge* v. *Winter*, 1 Camp. 262, *n*.

The inference from evidence tending to show that a way over a man's land is a public road may be rebutted by evidence of non-user for more than twenty years. *Burgwynn* v. *Lockhart*, 1 Winst. (N. C.) No. 1, 269. So, too, the parish being bound to repair all public roads the fact of no repairs having been made by it is a circumstance by which an inference of dedication may be rebutted. *Davies* v. *Stephens*, 7 Carr. & Payne, 570. So the presumption arising from thirty years' use by the public of a private way was held to be rebutted by the fact that the owner used it in like manner at the same time, repaired it at his own expense, paid taxes assessed thereon, stowed lumber on it and exercised other acts of ownership over it. *Irwin* v. *Dixon*, 9 How. (U. S.) 10. In a case where the proof showed that a roadway was opened through certain premises by digging ditches on either side, and without the knowledge of the owner, who was absent from the State, but who afterward permitted it to be continually used as a highway, yet the same year such roadway was opened the owner placed upon record a formal instrument of dedication, opening a street through a portion of his property, but stopping at that part so in use by the public, and which, in the recorded plat, had always been laid out into lots, such evidence must be regarded as rebutting any presumption which

might be drawn from user by the public of such roadway, of an intention to dedicate. *Kelly* v. *Chicago*, 48 Ill. 388.

A road opened before the Mass. stat. of 1846 may have been a highway by dedication or prescription, although opened by a tavern-keeper over his land for the accommodation of the tavern, and although both its termini are within the same town, and an order of county commissioners dismissing a petition for the discontinuance of a road as a highway, on the ground that it is not a highway, is no evidence that it is not one. *Commonwealth* v. *Petitcler*, 110 Mass. 62.

§ 13. **Title by prescription.** To establish a highway by prescription, there must be an actual public use, general, uninterrupted and continued under a claim of right for a period equal to that for the limitation of real actions. *State* v. *Green*, 41 Iowa, 693; *State* v. *Tucker*, 36 id. 485; *Gentleman* v. *Soule*, 32 Ill. 271. And where the public have traveled for more than ten years a route deviating slightly from that originally established, by reason of an obstacle in the surveyed route and pursuant to some arrangement with adjacent owners and not by mistake merely, such traveled route becomes a highway by prescription. *Kelsey* v. *Furman*, 36 Iowa, 614; *Commonwealth* v. *Old Colony, etc., R. R. Co.*, 14 Gray, 93. Although travel may slightly deviate from the thread of a road, yet the time in which various distinct lines of travel to a certain point have been used cannot be united so as to make up the requisite time to establish a prescriptive right to any given line of road. *Gentleman* v. *Soule*, 32 Ill. 271. A right of way cannot be prescribed for from mere use where the use is otherwise satisfactorily explained. *Smith* v. *Higbee*, 12 Vt. 113. Where one has permitted the public to use a road across his lands for twenty years, but during that time has kept a gate at each end of the road, the right acquired by the public is a qualified prescription, and the commissioner of roads will be enjoined from removing the gates. *Green* v. *Bethea*, 30 Ga. 896.

Public footways may exist in Boston by prescription which, by statute, the city is bound to keep in repair, and is responsible for if defective. *Gould* v. *Boston*, 120 Mass. 300.

Parol testimony tending to prove a highway by prescription may be received without requiring the party first to show that there is no record of such road, or that it was imperfect, or beyond his reach, or the like. The parol evidence is not secondary. Roads may be established by order of court, duly made and entered of record, by dedication of the owner by writing or by acts *in pais*, or by continued use of it as such by the public, for the time prescribed by the statute of limitations for bringing real actions. The best evidence in existence

which will prove a road established in either of these ways is necessarily *primary* evidence. As to the first, the best evidence would be the record; as to the second, the writing or parol proof of the acts showing the dedication, and, as to the last, parol evidence of the use of the road by the public for the time required. Whether the road is established by the one or the other of these methods, it is equally a public road. The law accords no preference to either, nor does it require a party to show that he cannot prove that the road was established in one of the ways mentioned before he can be allowed to prove that it was done in one of the other ways. *Mosier* v. *Vincent*, 34 Iowa, 478.

§ 14. **Title by user.** A highway may be proved by long usage, but for this, the user must be such as to show that the public accommodation requires it to be a highway, and that it is the intention of the owner of the soil to dedicate the way to the public. *Cemetery Ass.* v. *Meninger*, 14 Kans. 312; *Mc Whorter* v. *State*, 43 Tex. 666; *City of Steubenville* v. *King*, 23 Ohio St. 610; *Central R. R. Co.* v. *State*, 3 Vroom (N. J.), 220; *Day* v. *Allender*, 22 Md. 511; *Campton's Petition*, 41 N. H. 197; *Hinks* v. *Hinks*, 46 Me. 423. The user does not depend upon any fixed period of time. *Hiner* v. *Jeanpert*, 65 Ill. 428; *Stockwell* v. *Fitchburgh*, 110 Mass. 305; *Morgan* v. *Lombard*, 26 La. Ann. 462; *Keyes* v. *Tait*, 19 Iowa, 123; *Hays* v. *State*, 8 Ind. 425; *Hinks* v. *Hinks*, 46 Me. 423; *Commonwealth* v. *Cole*, 26 Penn. St. 187; *Campton's Petition*, 41 N. H. 197; *Day* v. *Allender*, 22 Md. 511. The mere unprohibited use of a road, by travelers, if unaccompanied by other facts from which its origin and character may be determined, does not raise any indisputable presumption that the road has become a legal highway. To establish a right of way by *prescription*, an adverse user must be shown for the requisite length of time. It is not competent to an owner of land to cast the burden of maintaining a highway upon a town, by devoting a strip of land to that use. *Mayberry* v. *Standish*, 56 Me. 342. See *Webb* v. *Portland, etc., R. R. Co.*, 57 id. 117; *Hobart* v. *Plymouth County*, 100 Mass. 159; *Debolt* v. *Carter*, 31 Ind. 355. If the right to a road be acquired by adverse *user* for twenty years, its *non-user* for a like space of time, with the knowledge and acquiescence of the owner of the inheritance, will extinguish the right so acquired, because such ceasing to use the road affords a legitimate presumption of a release of the right. *Browne* v. *Trustees of M. E. Church*, 37 Md. 108. But to constitute a highway by use it is not necessary that road work should be laid out on each particular portion of the road, or on each land-owner's lot. It is enough if the road as a whole is used and occupied for travel by the public, and work is done and taxes are laid out upon the road generally,

as evidencing a recognition of the existence of a highway, and a claim to it as such by the public authorities. Such use and recognition for ten years prior to alleged trespasses affords a justification for them provided the acts complained of were the removing of the obstructions from the roadway of such highway. *Scribner* v. *Blute*, 28 Wis. 148. But to entitle a public highway, established by use for twenty years or more, to be entered of record, it should be ascertained and described with the same certainty that would be necessary in establishing a highway originally. *Stephenson* v. *Farmer*, 49 Ind. 234.

Where the use of a strip of land for a highway is supposed to conform to the highway as laid out, but in fact varies from it, the public do not acquire a right to the strip actually used in virtue of an adverse possession, because the possession does not correspond with the claim of right, nor in virtue of dedication, because there was never an intent by the owner of the land to dedicate the strip used. *State* v. *Welpton*, 34 Iowa, 144.

The fact that one has erected a wall or building standing back from a highway, and that the land intervening between such wall or building and the highway has been used by the public as a highway for more than twenty years is not conclusive evidence that such land is and has become part of said highway. *Fall River, etc., Works* v. *Fall River*, 110 Mass. 428. In New Jersey the right of the public to the use of a by-road accrues by such acquiescence on the part of the owner of the soil as implies an intention to subject the same to public use. *Wood* v. *Hurd*, 34 N. J. L. 87. But, in such a case, the use must be of right; user by mere license subject to revocation at the pleasure of the owner of the soil, affords no foundation for presuming a gift. *Wood* v. *Hurd*, 34 N. J. L. 87.

In the case of a highway established by user, the jury may be authorized by the circumstances to find that its limits extend beyond the traveled path. *Hannum* v. *Belchertown*, 19 Pick. 311; *Sprague* v. *Waite*, 17 id. 309.

A road cannot be established by user, so that the town will be obliged to keep it in repair in summer, where, by reason of the erection of a dam, it is overflowed, so that it is only traveled upon on the ice in winter. *State* v. *Calais*, 48 Me. 456.

A highway may be dedicated to the public subject to a pre-existing right of user by the occupiers of adjoining land, for the purpose of depositing goods thereon. *Morant* v. *Chamberlain*, 6 Hurl. & Nor. 541.

§ 15. **Rights of adjoining land-owners.** The owner of lands through which a highway is established retains the fee of the soil embraced within its limits, with the full right to its enjoyment in any

manner not inconsistent with the enjoyment of the easement by the public for the purpose of a highway, and this right is exclusive against all other persons. *Holden* v. *Shattuck*, 34 Vt. 336. See the next section. He may make such use of his land within the limits of the highway, for the placing of lumber, etc., as is, under all the circumstances of the case, reasonable and proper, and when thus used the lumber will not be an incumbrance. *Chamberlain* v. *Enfield*, 43 N. H. 356. Trees in a highway are the property of the adjacent owner, and if they encroach upon the highway, and must be removed, he has a right and must be afforded a reasonable opportunity to take them as living trees, and transplant them elsewhere. *Clark* v. *Dasso*, 34 Mich. 86. So, the herbage growing upon the highway is exclusively the adjoining owner's. *Woodruff* v. *Neal*, 28 Conn. 165. The presumption is that the soil of a road, *usque ad medium filum viæ* belongs to the owners of the adjoining lands. And the presumption applies equally to a private as to a public road. *Holmes* v. *Bellingham*, 7 C. B. (N. S.) 329; *Cooke* v. *Green*, 11 Price, 736; *Willoughby* v. *Jenks*, 20 Wend. 96. And when this is the case this adjoining owner may under certain circumstances maintain an action of ejectment or of trespass in respect thereto. *Dunham* v. *Williams*, 36 Barb. 136; *Bingham* v. *Doane*, 9 Ham. (Ohio) 165. A surveyor of highways would be personally liable in a suit for damages to the adjoining land-owner for making an uncovered trench or ditch by the side of the traveled part of the highway, next and opposite to a house, yard or private way, by means of which the passage to such house, etc., was obstructed, because in that case he acts without authority and in violation of law. *Waldron* v. *Berry*, 51 N. H. 136.

So, an overseer of highways has no right in making repairs upon a highway, although in other respects suitable and proper, to change a natural water-course, or the natural course of surface-water drainage, so as to cast the water upon the lands of an owner abutting upon a highway where it had not been previously accustomed to flow; or to increase considerably in volume and quantity, either the water in a natural water-course or from surface drainage flowing upon such land, to the injury of the owner thereof. *Moran* v. *McClearns*, 63 Barb. 185; S. C., 44 How. Pr. 30.

And commissioners of a highway that has not been laid out and recorded in the manner required by law are trespassers if they tear down or otherwise interfere with private property as an encroachment upon such highway. *Marvin* v. *Pardee*, 64 Barb. 353. See *Mosier* v. *Vincent*, 34 Iowa, 478; *Campbell* v. *Kennedy*, 34 Iowa, 494.

Whether a highway lawfully exists over private property is a question

which cannot be settled against the owner without the right to a trial in due course of law; and a municipal board cannot decide upon it, so as to bind him, and acts at its peril in attempting it. Such municipal action is not judicial, and if it were it would be void, because an interested party cannot be a judge in his own cause. *Sheldon* v. *Kalamazoo*, 24 Mich. 383.

The liability to repair a highway, by reason of the inclosure of adjoining land, is in the occupant of the lands inclosed, not in the owner, as owner. *Reg.* v. *Ramsden*, 1 El. B. & El. 949.

If a public road is opened and established along the bank of a river, on land of an individual proprietor, regularly condemned for the purpose according to the statute, and the land on which the road was so opened and established is washed away in whole or in part by high waters, the public has no right to take so much other adjoining land of the proprietor as may suffice for the highway, without a new view and condemnation thereof, and compensation for the same, according to the statute. *Beeson's Case*, 3 Leigh (Va.), 821.

Where a highway has been mislocated, an abutting land-owner, who has acquiesced therein over twenty years, cannot move his fence and narrow the road used by the public. *State* v. *Groendyke*, 38 N. J. L. 114.

The ordinary presumption is, that strips of land lying along a highway, even though indirectly connected with parts of the waste, belong to the owner of the adjacent inclosed land, between which and the actual beaten road they lie, and not to the lord of the manor, especially if the adjacent owner has done acts of ownership without interruption upon the land. *Dendy* v. *Simpson*, 10 C. B. (N. S.) 883.

§ 16. **Title to land used as a highway.** Ordinarily, upon the establishment of a highway or street, the fee of the land remains in the land-owner, and he still owns all things connected with or appertaining to the land, such as the trees upon it, the mines within it, etc., subject only to the easement of the public and the right of the town officers to keep the highway or street in repair. *Overman* v. *May*, 35 Iowa, 89; *Commissioners, etc.*, v. *Beckwith*, 10 Kans. 603; *Cuming* v. *Prang*, 24 Mich. 514; *West Covington* v. *Freking*, 8 Bush (Ky.), 121; *Knox* v. *New York*, 55 Barb. 404; S. C., 38 How. 67; *Boston* v. *Richardson*, 13 Allen, 146; *Mendez* v. *Dugart*, 17 La. Ann. 171. See *Taylor* v. *Danbury Public Hall Co.*, 35 Conn. 430. Laws or ordinances passed by a village corporation for the protection of trees standing on streets or highways, of which the soil belongs to adjacent owners, must be held to apply to persons other than the owners. Nor can the legislature authorize the infliction of a penalty upon the owner

of the trees for their removal, unless the public have acquired title by purchase, or the exercise of the right of eminent domain. *Lancaster* v. *Richardson*, 4 Lans. (N. Y.) 136. See *Phifer* v. *Cox*, 21 Ohio St. 248.

In keeping a highway in repair, the proper officer may use the stone within the limits of the highway or street, in a reasonable and proper manner for that purpose. But this does not authorize him to quarry stone in the bed of a river spanned by a bridge, constituting the highway in question, to repair other streets. *Overman* v. *May*, 35 Iowa, 89. See *Commissioners, etc.*, v. *Beckwith*, 10 Kans. 603.

Permission given by a highway surveyor to a party to cut the grass on a highway not passing over the party's land, gives him no right to the grass itself. If he appropriates it to his own use, he is a trespasser *ab initio*. *Cole* v. *Drew*, 44 Vt. 49; 8 Am. Rep. 363.

The owner of soil on which the public has a highway has a right to cut a passage across the way for the purpose of draining his land or leading water to his mill, provided he does not interfere with the public easement. And to this end he is bound to erect bridges over the passage where it crosses the highway, and keep them in repair, and a subsequent owner of the land, who continues the water-course across the highway, is bound to repair the bridge. *Woodring* v. *Forks Township*, 28 Penn. St. 355. See *Perley* v. *Chandler*, 6 Mass. 454.

If the owner of land, over which a public highway passes, digs a raceway across the road to conduct water to his mill and builds a bridge over the raceway, and an injury is sustained by any one in consequence of the bridge being out of repair, such owner is liable in damages to the injured party. *Dygert* v. *Schenck*, 23 Wend. 446; *Congreve* v. *Smith*, 18 N. Y. (4 Smith) 79, 82.

Where lots are sold by reference to a map and designated as bounding on a street there laid down, such lots are presumed to extend to the center of such street. *Perrin* v. *N. Y. Central R. R. Co.*, 36 N. Y. (9 Tiff.) 120.

The law of highways applies in full force to all streets in the city of New York, and in the absence of proof of the ownership in the city, even the title will be presumed to be in the adjacent owners. *Mott* v. *New York*, 2 Hilt. (N. Y.) 358.

A party by the act of filling out a highway or private way does not acquire an ownership inconsistent with the right of way over the extended street. *Peck* v. *Providence Steam Engine Co.*, 8 R. I. 353.

According to the civil law, a grant of land calling for a public road as a boundary, conveyed no title to the soil covered by the road; but the title to the road-bed remained in the sovereignty. Hence, upon

the abandonment of the road as a highway, the land covered by it became vacant public domain, subject to entry, and did not belong, as it would at common law, to proprietors whose lands were bounded by the road. *Mitchell* v. *Bass*, 33 Tex. 259.

§ 17. **Abandonment or discontinuance.** At common law, the doctrine of the earlier cases is, that there can be no loss of the public right by mere non-user. A highway once established must always remain such until changed or discontinued by process of law. *Rex* v. *Ward*, Cro. Car. 266, pl. 66. And see *Thomas* v. *Conell*, Vaugh. 341; 2 Selwyn's N. P. by Whart. (4th ed.) p. 503; *Payne* v. *Partridge*, 2 Show. 255; 1 Salk. 12. This doctrine has been departed from in more recent decisions, and it has been held that the non-user of an easement of this kind, for many years, is *prima facie* evidence of a release of the right to the person over whose land the highway once ran; and although the precise limit of time in respect of the public, in such cases, has not been established, there can be no doubt that the desertion of a public road for nearly a century is strong presumptive evidence that the right of way has been extinguished. *Beardslee* v. *French*, 7 Conn. 125. See *Commissioners* v. *Taylor*, 2 Bay. 282; *Cutter* v. *Cambridge*, 6 Allen, 20; *Fox* v. *Hart*, 11 Ohio, 414. So a public way may be shown to have been discontinued by proof that it has been shut up, and the land inclosed by permanent fences, and occupied or improved for purposes inconsistent with its use as a public way, for a long series of years, by continuous acts of successive owners of an adjoining close. *Holt* v. *Sargent*, 15 Gray, 97. See *Knight* v. *Heaton*, 22 Vt. 480; *Hillary* v. *Walker*, 12 Ves. 239, 265. But where a street has been simply laid out and no steps taken toward its completion or preparation for public use, it has been held that a possession and occupancy of the land within the limits of such street for a period of more than twenty years, do not divest the rights of the public, because such possession is not adverse, but perfectly consistent with the public rights. *Henshaw* v. *Hunting*, 1 Gray, 203. See *Hollenback* v. *Rowley*, 8 Allen, 473.

Where a public highway has been abandoned for a great length of time and another road has been opened and traveled by the public, and recognized by the public authorities having charge of the roads, and repaired by them as such, an abandonment may be presumed. *Galbraith* v. *Littiech*, 73 Ill. 209; *Grube* v. *Nichols*, 36 id. 92. But after the public has acquired, by long user, an easement in the land over which a road passes, the laying out by the town of another road near the first one will not operate as a discontinuance of the latter, or defeat the public easement, if the record is silent on the subject. *Chad-*

*wick* v. *McCausland*, 47 Me. 342. See *People* v. *Commissioners, etc.*, 16 Mich. 63; *Isham* v. *Smith*, 21 Wis. 32. The public right to a road used by land-owners for access to their farms is not considered as lost by abandonment, so long as the road has been kept open and the public never excluded therefrom. *State* v. *Morse*, 50 N. H. 9.

A municipal corporation authorized "to locate and establish streets and to vacate the same," may vacate any street, and the right to vacate is not confined to the streets which the city "may locate and establish," and this power when discreetly exercised will not be restrained when no material injury results therefrom. *Gray* v. *Iowa Land Co.*, 26 Iowa, 387.

Land abutting on a way into which another leads, and lying opposite the junction of the two, is included in an act, which, while discontinuing the second way, saves the rights of owners of adjoining lands. *Wood* v. *Stourbridge R. R. Co.*, 16 C. B. (N. S.) 222.

A highway does not cease to be such, from the facts that a ferry to which it originally led has been removed and that a part of the way has been appropriated and built upon, if the passage continues open. *Galatian* v. *Gardner*, 7 Johns. 106.

§ 18. **Obstruction or encroachment.** The right of the public in a common highway is paramount, and extends to the entire territory within its limits. Any obstruction which unnecessarily incommodes or impedes the public in the lawful use of such highway constitutes a nuisance, and it is still unlawful, however long it may be continued. *Morton* v. *Moore*, 15 Gray, 573; *State* v. *Pierson*, 37 N. J. Law, 216; *Philadelphia's Appeal*, 78 Penn. St. 33; *Gerrish* v. *Brown*, 51 Me. 256; *Columbus* v. *Jaques*, 30 Ga. 506. Thus, it is a nuisance at common law to dig a ditch, or to make a hedge across a highway, to suffer adjoining ditches to be foul, by reason whereof it is impaired, or to suffer the boughs of trees growing near, to overhang it in such a manner as to incommode the passage (1 Hawk. P. C. 76, §§ 48, 50); to erect a gate or fence even though the fence does not interfere with travel (*James* v. *Hayward*, Cro. Car. 184; *Greasly* v. *Codling*, 2 Bing. 263; *Harrower* v. *Ritson*, 37 Barb. 301; *Gregory* v. *Commonwealth*, 2 Dana, 417; *Kelly* v. *Commonwealth*, 11 S. & R. 345); to place a building on it, to deposit lime or gravel in it, though for temporary convenience, to pile logs or lumber therein, or in any manner unreasonably to obstruct the public passage. *Osborne* v. *Union Ferry Co.*, 53 Barb. 629; *Mould* v. *Williams*, 5 Ad. & El. (N. S.) 469; *Burgess* v. *Gray*, 1 Man. Gr. & Scott, 578; *Bush* v. *Steinman*, 1 B. & P. 404; *Stetson* v. *Faxon*, 19 Pick. 147; *Barker* v. *Commonwealth*, 19 Penn. St. 412. But the right of the public in the use of a highway is subject to such incidental

and temporary or partial obstructions as manifest necessity may require, such as the temporary stopping in the street of companies of persons, or of carriages, and the delivery of freight, goods and fuel at business and other houses, the repair of streets and the deposit of materials there, for the building and repair of houses, etc. These are not invasions, but qualifications of the right of transit, and the only limitation upon them is, that they must not be unnecessarily or unreasonably interposed or prolonged. *Clark* v. *Fry*, 8 Ohio St. 358; *Wood* v. *Mears*, 12 Ind. 515; *Commonwealth* v. *Passmore*, 1 S. & R. 217; *St. Johns* v. *Mayor, etc.*, 6 Duer, 315; *Gahagan* v. *Boston & Lowell R. R.*, 1 Allen, 187; *Rex* v. *Ward*, 4 Ad. & El. 405. An indictment will not lie for obstructing a highway, by holding a fair or market, if there has been an uninterrupted custom for twenty years. *Rex* v. *Smith*, 4 Esp. 109; *Rex* v. *Canfield*, 6 id. 136. But a sale by a constable under an execution in a public street, in such a manner as to obstruct passers by, is a nuisance notwithstanding a custom, for fifteen years, to do so. *Commonwealth* v. *Milliman* 13 S. & R. 403. And see *Wilkes* v. *Hungerford Market*, 2 Bing. N. C. 281.

It is an indictable nuisance to obstruct, or to employ others to obstruct a public highway or footway, by placing earth and bricks thereon, taking up the pavement and opening trenches for the purpose of laying down service-pipes for the supply of gas from public mains to private houses, unless those who do or authorize such acts have parliamentary powers for the purpose. Such acts cannot be justified by the occupiers of the houses, as an exercise of the right of every householder to make such a temporary obstruction of a highway or footway, as may be necessarily incident to the enjoyment of his property. *Regina* v. *Langton Gas Co.*, 2 Ellis & E. 651; *Regina* v. *Sheffield Gas Co.*, 22 Eng. Law & Eq. 518.

A road may be rendered unsafe by objects upon it calculated to frighten horses, as well as by its defective construction; and where the object is such as to frighten horses of ordinary gentleness, it is a nuisance which it is the duty of the town to remove. *Dimock* v. *Suffield*, 30 Conn. 129. An area, opening into a public footway, or so near thereto that persons lawfully using the way with ordinary care might, by accident, fall into it, is *per se* a nuisance, and only ceases to be such when proper means are adopted, either by inclosure or otherwise, to guard against the occurrence of such accidents. *Temperance Hall Assoc.* v. *Giles*, 33 N. J. Law (4 Vr.), 260. So if a house on a highway be ruinous and likely to fall down, it is a nuisance. *Regina* v. *Watts*, 1 Salk. 357.

Where one who owned land on both sides of a highway where a

stream of water crossed it, without interfering with travel on the highway, erected obstructions so that the stream could not be reached, it was held that such obstructions were not a nuisance, public or private, and that another who had watered his cattle at that place for over twenty years had, from such use, no right to continue to do so, and was guilty of trespass in tearing the obstructions down. *Strickland* v. *Woolworth*, 3 Sup. Ct. (T. & C.), N. Y. 286.

It is a general rule of law, that, where a highway is unlawfully obstructed, any person who wants to use the highway may remove the obstruction, and may even enter for that purpose upon the land of the party erecting or continuing it, doing as little damage as possible. *Williams* v. *Fink*, 18 Wis. 265; *Arundel* v. *McCulloch*, 10 Mass. 70. Every person who assumes to judge of and remove an obstruction to a highway, upon the ground that it is a nuisance, does so at his own risk; and if he misjudges he is liable for the damages. This rule applies to a municipal corporation. And such nuisance can be abated only so far as to enable the public to enjoy the right of way. *Howard* v. *Robbins*, 1 Lans. (N. Y.) 63. A citizen has not the right to remove any obstruction on the public street or highway, merely because such obstruction is a public nuisance. No such right exists in any person except one who, apart from the injury which he, as one of the public, sustains in common with his fellow-citizens, is especially inconvenienced by the obstruction on the street. Hence, where the plaintiffs, while occupying the store adjoining the defendants', caused to be erected, without any permission, in front of the defendant's store, a triangular box, seven feet high and projecting about two feet and a half from the curb upon the sidewalk, around a telegraph pole, and caused their names and business to be printed upon it, using it as a sign, and the defendants ordered the plaintiffs to remove the box, and threatened to remove it themselves, and to obliterate the sign, and, upon the plaintiffs refusing, the defendants caused the names and sign on the box to be daubed with paint so as to obliterate them; it was held that the defendants were liable as for a malicious trespass. *Goldsmith* v. *Jones*, 43 How. (N. Y.) 415. See *Drake* v. *Rogers*, 3 Hill, 604.

Fresh water rivers, of public use in the transportation of goods, are of common right as public highways by water. *Spring* v. *Russell*, 7 Me. 273. As incident to the right of navigation, the temporary obstruction of portions of the river while preparing their materials for transportation, or in securing them at the termination of their transit, constitutes no violation of law, and for such purposes parties may use temporary guide booms to direct the logs or lumber into proper places in floatable streams, but this does not authorize them to use the stream

as a place of permanent deposit, so as to obstruct the navigation; nor can they be allowed to cast slabs, edgings, or other waste material into a stream to be floated away or otherwise as may happen, and any such use of the stream will render them liable for injuries sustained thereby. *Veazie* v. *Dwinel*, 50 Me. 479; *Gerrish* v. *Brown*, 51 id. 256.

Where an adjoining land-owner moves his fence into the middle of a highway so as to endanger or inconvenience travel thereon, he commits a nuisance, and the town supervisors are authorized, and it is their duty, to remove such fence summarily. *Neff* v. *Paddock*, 26 Wis. 546.

Where a public way is impassable, and where the act is done as the only means of extricating a team from a mudhole or bog therein, the pulling down of a fence at the side of a way, and passing over the adjoining land, is a necessary and justifiable act. *Hedgepath* v. *Robertson*, 18 Tex. 858; *Kent* v. *Judkins*, 53 Me. 160. The obstruction of a legally established highway, which cannot be used by the public for the purposes of a highway in consequence of natural obstacles, is not an indictable offense. *State* v. *Shinkle*, 40 Iowa, 131. But see *State* v. *McGee*, id. 595.

It is the duty, in New York, of commissioners of highways summarily to remove from a highway a building or other obstruction placed thereon, interfering with public travel. *Cook* v. *Harris*, 61 N. Y. (18 Sick.) 448. See *Kellogg* v. *Thompson*, 66 N. Y. (21 Sick.) 88.

No action lies against a person maintaining an area cover or stone steps projecting into and obstructing a highway, for injuries to the plaintiff's person by such obstructions, provided the obstructions existed at the time such highway was dedicated to the public; and this, though the steps had been subsequently lowered to meet a corresponding lowering of the highway, and though the action would lie, were either of the obstructions put down for the first time after the dedication of the way. *Fisher* v. *Prowse*, 2 B. & S. 770.

Although a public bridge across a public road is a part of the highway, yet a failure to keep the bridge in repair, on the part of one whose duty it is to repair it, is not an obstruction of the public road. *Malone* v. *State*, 51 Ala. 55. And refusing to remove a fence which was in a highway when it was laid out, does not constitute the offense of obstructing a highway by building a fence therein. *State* v. *Young*, 72 Ill. 411.

Where a party has obstructed a public road by placing gates across the same for several years prior, and the road commissioners remove the same, and he again places them in the road, this will constitute a new offense for which he may be convicted; and the limitation will

run as to it only from the time when the gates are again erected. *Henline* v. *People*, 81 Ill. 269.

§ 19. **Repairs of highways.** See Vol. 4, p. 673 *et seq.* By the law of England the duty of keeping roads in repair devolved upon the parishes. This obligation was absolute and irrespective of any particular resources or means for the purpose. Neither the organization or boundaries of these parishes, nor the obligation thus resting upon them, had their origin in any positive enactment, but both were founded in prescription or immemorial usage. The duty, however, was universal, unless by some counter-prescription, or by statute, it was made to rest upon some individual or some political or corporate body. *Rex* v. *Sheffield*, 2 Term R. 106; *Rex* v. *The Mayor, etc., of Warwick*, 2 Show. 202; *Rex* v. *Rayley*, 12 Mod. 409. By common law, in the United States, this obligation does not exist; but in most of the States it is imposed by statute on the several towns within which the highways are situate. And after the apportionment of a town line road has been duly made and recorded, each town, as to the part apportioned to it, becomes subject to the same liabilities as if the highway were wholly located in such town. *Montgomery* v. *Scott*, 34 Wis. 338. "There is no very close correspondence between the nature and object of organization of towns in this State," says SELDEN, J., "and that of parishes in England. While the former are exclusively political in their character, the latter were primarily ecclesiastical, and only incidentally political through the connection, in England, between the church and the government. But again, towns were known in England and recognized as political bodies as well as and distinct from parishes. A single parish might, and frequently did, embrace a number of towns. The obligation, however, to repair the roads never rested upon the towns as such, unless by force of some statute, or special usage and prescription. It is clear, therefore, that towns, in this country, do not succeed to the duties of repairing highways in consequence of any special correspondence between their nature, organization and functions and those of parishes in England, but if at all, it must be because, by our statutes, certain powers are given to, and certain duties imposed upon towns, or rather upon their officers, in regard to roads, and because the making and repairing of roads is to a considerable extent accomplished through our town organizations. But it is difficult to see how this common-law obligation, the sole foundation of which is in *prescription* or *immemorial usage*, can be made to attach to bodies of modern statutory creation, unknown to the common law, as they exist here." *Morey* v. *Town of Newfane*, 8 Barb. 645. See, also, *People, etc.* v. *Auditors of Esopus*, 10 Hun, 551, 554. Compare *Loker* v. *Brookline*, 13 Pick. 343.

But see *Commonwealth* v. *Hopkinsville*, 7 B. Monr. 38; *City of Tallahassee* v. *Fortune*, 3 Fla. 19; *People* v. *Albany*, 11 Wend. 539. But though the towns in this country are amenable to no other rule, and only to the precise measure of obligation prescribed by the statute, yet, in kind and degree, that obligation is very much the same as at common law, or differs only by its severer stringency. Ang. on Highways, 299. The extent of the responsibility of towns for defects and obstructions exterior to the worked or traveled way, and for injuries suffered from such defects or obstructions, in the use of that portion of the way, is mainly a question of law, calling for special instructions from the court. *Rice* v. *Montpelier*, 19 Vt. 470. Generally the town has done its duty, when it has prepared a pathway of suitable width, in such a manner that it can be conveniently traveled with teams and carriages; but the citizens are not thereby deprived of the right to travel over the whole width of the way as laid out, without being subjected to other or greater dangers than may be presented by natural obstacles, or those occasioned by making and repairing the traveled path. Thus, a town is liable for an injury caused by a cedar log lying in its highway, on the side of the traveled part. *Johnson* v. *Whitefield*, 18 Me. 286. And see *Commonwealth* v. *Belding*, 13 Metc. 10; *Smith* v. *Wendell*, 7 Cush. 498; *Winship* v. *Enfield*, 42 N. H. 197. But where a town has kept in repair a road sufficiently wide and suitable for all travel, it is not chargeable with a foot-path some fifteen or twenty feet from the road, and running alongside of it, as part of the highway. *Whitney* v. *Essex*, 38 Vt. 270. Nor is it liable for special damage incurred on account of an injury caused by large, loose stones lying outside of the gutter, and seven feet and eight inches from the cart rut in a highway, thirty-four feet in width. *Howard* v. *North Bridgewater*, 16 Pick. 189. And see *Smith* v. *Wendell*, 7 Cush. 498. Whether an object outside of the traveled path is such an obstruction as to be a defect for which the town is liable, is a question for the jury. *Chamberlain* v. *Enfield*, 43 N. H. 356.

Obstructions necessarily created in highways, in order to repair them, are not such defects as will create a liability on the part of the town for injuries occasioned by them, provided reasonable measures are taken to notify travelers of their existence. *Morton* v. *Frankfort*, 55 Me. 46. And towns are not required to fence their roads, with a view to prevent frightened animals from escaping out of the highway, even when the near locality of a railroad may render such an occurrence probable. The essential and invariable term, or element, in all cases where a railing is required, is some dangerous object or place outside of the required railing, in or upon which the traveler may come to harm, if

not warned or detained therefrom by the railing. *Adams* v. *Natick*, 13 Allen, 429.

A highway, laid out for the accommodation of an individual by the selectmen, although subject to gates and bars, is still a public highway, and all persons having occasion are entitled to use it, and the town, being bound to keep it in suitable repair, is liable for special damages caused by want of such repairs. *Proctor* v. *Andover*, 42 N. H. 348. And a space lying without the limits of a highway, as originally laid out, having been treated by the town and the public as a highway for more than forty years, the town is bound to keep it in repair, and is liable for injuries resulting from its insufficiency, the same as though it had been embraced in the original survey. *Bagley* v. *Ludlow*, 41 Vt. 425. If, by long user, the public have acquired the right of way over land through which it passes, the town may legally make such repairs as will render it safe and convenient for travelers, as by leveling the road and constructing a sidewalk. *Chadwick* v. *McCausland*, 47 Me. 342.

Where a sidewalk has been constructed and thrown open for public use, and has been used with the rest of the street by the public, it must be maintained by the city, and kept in such repair as to be reasonably safe and convenient for travelers. *Manchester* v. *Hartford*, 30 Conn. 118; *Bacon* v. *The City of Boston*, 3 Cush. 174. See *City of Chicago* v. *Bixby*, 84 Ill. 82. Sidewalks are a part of the public highway, and the owner of adjoining lands has no greater duty in regard to keeping them in repair than he has in regard to other parts of the highway. Accordingly, where a village was held liable for negligence in allowing a sidewalk to be out of repair, it was held that in the absence of statute or contract, no right of action to indemnify the village lay against the owner of adjoining lands. *Village of Fulton* v. *Tucker*, 5 N. Y. S. C. (T. & C.) 621; S. C., 3 Hun, 529. Where the evidence fails to show that the city authorities had notice that a plank in a sidewalk was loose, which caused a personal injury, or such circumstances as that they, in the exercise of a reasonable diligence, should have known it was loose, the city will not be liable to the person injured. *City of Chicago* v. *Murphy*, 84 Ill. 224.

The duty of repairing bridges, as of roads, is, in the United States, regulated by statute.

If a bridge be built by an individual, and dedicated to the public and by them used for so long a period as to evince its usefulness, though for less than twenty years, and though during that period the public have used and repaired it under protest against their liability, yet it becomes a public bridge which the town is bound to repair. *State*

v. *Campton*, 2 N. H. 513; *Wilson* v. *Jefferson*, 13 Iowa, 181. The liability of a town to contribute to repairing a bridge built by private means and dedicated to public use, over a stream dividing it from an adjoining town, may be shown by the record of official acts; by acts of possession and control; by the recognition and use of the easement; or in any manner evincing a complete understanding to that effect. *Rutland* v. *Dayton*, 60 Ill. 58. But where a petitioner for a highway agreed to bear the expense of making it, and the road lay across a canal constructed by them through his land at the same time with the road, it was held that he was liable for the expenses of keeping the bridge required for crossing the canal in repair, the general rule, that the cost of bridging an existing water-course for a highway is upon the public, being inapplicable. *Lowell* v. *Proprietors of Locks, etc.*, 104 Mass. 18. An individual who builds a bridge over a public highway for his own exclusive benefit, or a corporation who, in pursuance of their charter, build a turnpike road or bridge, and take toll from passengers, thereby become bound to keep the road or bridge in repair. *Heacock* v. *Sherman*, 14 Wend. 58; *Waterbury* v. *Clark*, 4 Day (Conn.), 198; *Goshen, etc., Turnp. Co.* v. *Sears*, 7 Conn. 86; *Bartlett* v. *Crozier*, 15 Johns. 250. But where an individual builds a bridge over a private way for his own benefit, he is not indictable for neglecting to repair it, though it be generally used by the public. *State* v. *Seawell*, 3 Hawks, 193.

If the owner of a water-mill, whose pond is raised by a causeway, which he maintains by affirmative acts as his dam, but which forms part of a highway that the town is bound to keep in repair, renders repairs to it as a highway, needful by his negligence in maintaining it as a dam, he is liable to the town for the cost of such repairs. And a relocation of the highway after the causeway was built will not exonerate him from the responsibility of due care, so long as he maintains the structure whose decay causes the mischief. *Brookfield* v. *Walker*, 100 Mass. 94.

At common law where the duty of repairing the roads of a municipal district rests upon individuals they are indictable for neglect to keep them in repair. *Phillips* v. *Commonwealth*, 44 Penn. St. 197. And whenever a person or corporation, bound to repair a public highway, refuses to do so, when necessary, on notice from the proper public officers, they may make the necessary repairs, and recover the expense thereof in an action of assumpsit. *Pennsylvania R. R. Co.* v. *Duquesne*, 46 Penn. St. 223; *Hart* v. *Gaven*, 12 Cal. 476.

The general duty of towns to keep their highways safe and convenient extends as well to defects and obstructions occasioned by falls and drifts of snow as by any other cause. *Loker* v. *Brookline*, 13 Pick.

343, 346; *Green* v. *Danby*, 12 Vt. 338. See *The City of Providence* v. *Clapp*, 17 How. (U. S.) 161; *Rogers* v. *Newport*, 62 Me. 101.

Where a bridge over a stream dividing two towns is recognized and accepted as a public bridge by the public officers of each town, each will be liable to one-half of the expense of keeping the same in repair, and the liability may be enforced by suit at law. *Town of Dayton* v. *Town of Rutland*, 84 Ill. 279.

Where the commissioners of highways, in constructing an embankment upon a highway, omit to put therein a sufficient culvert to carry off the surface-water coming on from the adjoining lands, their successors in office are not liable in a private action, at the suit of the owner, for injuries resulting from the accumulation of water upon such lands, caused by such embankment. *Gould* v. *Booth*, 66 N. Y. (21 Sick.) 62.

§ 20. **Injuries from defective highways.** A town is not liable for every object which renders a way unsafe and inconvenient for travelers to pass over it, but only for such as not only renders the way unsafe and inconvenient, but also defective or out of repair; and the injury must be attributable to the defect or want of repair. *Cook* v. *Charlestown*, 13 Allen, 190, *note*. It is not liable for latent defects not discoverable by the use of ordinary care and prudence on its part. *Prindle* v. *Fletcher*, 39 Vt. 255. It is not required to make the traveled part of a highway of the whole width of the road, as laid out, and will not be liable for defects in that part not usually traveled upon, which do not affect the safety of that part. *Dickey* v. *Maine Tel. Co.*, 46 Me. 483. It should provide for the safety of travelers in passing teams going in the same direction, and should construct and keep their highways, at places which naturally invite the attempt to pass, reasonably safe for that purpose. *Moehler* v. *Shaftsbury*, 46 Vt. 580; 14 Am. Rep. 634. But the measure of this obligation varies with the circumstances of each particular road; the nature of the country, whether rough, smooth, or hilly; the amount of travel and the places near on which carriages could be turned out. There may be ledges of rocks, ravines, and water-courses in the road, and towns are not expected in all cases to bridge the whole width of the road, to fill up ravines, or cut down ledges of rock. The most that could be required in roads so difficult by nature is, that the sides should be in such a state as would admit of the passing of carriages, when they meet, without unusual delay or trouble. See *Hull* v. *Richmond*, 2 Woodb. & M. 337; *Johnson* v. *Whitefield*, 18 Me. 286; *Snow* v. *Adams*, 1 Cush. 443. The original construction of roads is to be governed by the topographical features, population, and taxable ability of the township. *Perry Township* v. *John*, 79 Penn. St. 412.

A traveler, knowing nothing of a road, and being unable to discover any thing to the contrary, has a right to presume that the road is reasonably safe in its surface, margin and muniments. *Glidden* v. *Reading*, 38 Vt. 52, 57; *Seward* v. *Milford*, 21 Wis. 485. And although a railroad company, by its charter, is bound to keep its road so constructed at all times as not to obstruct the safe and convenient use of the highways, a town is not thereby absolved from its obligations to see that the highways therein are not rendered unsafe by the crossing of the railroad. *Wellcome* v. *Leeds*, 51 Me. 313.

If there are two efficient, independent proximate causes of an injury sustained by a traveler upon a highway, the primary cause being one for which the town is not responsible, and the other being a defect in such highway, the injury cannot be said to have been received "through such defect," and the town is not liable therefor. And it makes no difference that the traveler himself was in no fault. *Moulton* v. *Sanford*, 51 Me. 127; *Shepherd* v. *Chelsea*, 4 Allen, 113. Though see below, *Chamberlain* v. *Enfield*, 43 N. H. 356. But it is the duty of a municipality, bound to construct and maintain highways, to provide for the reasonable safety of travelers in reference *to such accidents as may be expected to happen therein;* and when a traveler is not in fault, and an injury happens to him, which is the combined result of accident, and of negligence attributable to the municipality because of its omission to keep the road in repair, the latter will be held liable for the damages occasioned thereby. *Ring* v. *City of Cohoes*, 13 Hun (N. Y.), 76. This seems to be the true rule, and the doctrine in *Moulton* v. *Sanford*, 51 Me. 127, above cited, is quite generally discredited. See *Kelsey* v. *Town of Glover*, 15 Vt. 708; *Baldwin* v. *Greenwood Turnp. Co.*, 40 Conn. 238; 16 Am. Rep. 33; *Lower Macungie Township* v. *Merkhoffer*, 71 Penn. St. 276; *Manderschiel* v. *Dubuque*, 25 Iowa, 108. The traveler is not bound to see to it that his carraige and harness are always perfect, and his team of the most manageable character and in the most perfect training, before he ventures upon the highway. *Hunt* v. *Town of Pownal*, 9 Vt. 411; *Ward* v. *Town of North Haven*, 43 Conn. 148. The greatest precaution and the most penetrating foresight cannot prevent casualties by the safest modes of conveyance. Accidents will occur. A nut or bolt may drop, a trace may become disengaged, or a horse take fright and become unmanageable; it is under circumstances like these, when life and limb are imperiled, that the traveler who is in no fault himself, is entitled, if ever, to the benefit of a sufficient and unincumbered highway. The injuries are few that are received upon highways, however defective, that are not induced in a greater or less

degree, by some previously unknown defect, either in the carriage or harness, or by the fright of the horse, or some similar cause, usually termed accidental; and to say that under circumstances of danger and peril from those and other accidental causes, the traveler is not entitled to the safety that a highway unincumbered and without defects, that is, a highway made reasonably safe against the occurrence of such accidents as these, would afford, at a time when, of all others, he has the greatest need, would seem to be repugnant to reason and common sense. *Winship* v. *Enfield*, 42 N. H. 197; *Ring* v. *City of Cohoes*, 13 Hun (N. Y.), 76, 86. And see *Hunt* v. *Town of Pownal*, 9 Vt. 411.

In Maine and Massachusetts it is held that if the horse is uncontrollable, and that cause combined with the highway's defect occasions the injury, the town is not liable. See *Moore* v. *Abbott*, 32 Me. 46; *Fogg* v. *Nahant*, 98 Mass. 578. But in the latter State it is allowed that if a horse driven with due care is caused to step out of the traveled track by an object within the limits of the highway, which would cause an ordinarily gentle and well broken horse to do so, whereby the traveler is brought into contact with a defect in the surface of the way, or a place on the side of the way defective for want of a railing, and so is injured, the town is liable in damages; although it might not be liable in case of a less formidable object, or of a horse of a vicious habit. *Stone* v. *Hubbardston*, 100 Mass. 49. And it is conceded in Maine that if a defect in a highway causes such a breaking and derangement of a safe and proper vehicle, that a kind and well-broken horse is frightened beyond the control of a reasonably skillful and careful driver, and violently running down a steep hill, falls, and throws out and injures the traveler, is to be considered the proximate cause of the injury, and the fall is not to be considered a contributory cause of the accident. *Willey* v. *Inhabitants of Belfast*, 61 Me. 569. And it has been held in Massachusetts that a town was not liable for an injury to a traveler resulting from a collision of his carriage with a hitching post, in a dark night, the highway being smooth, forty feet wide, and nearly level, although the carriage path was not bounded from the sidewalk by any gutter, trees, railing, or curb-stone. *Macomber* v. *Taunton*, 100 Mass. 255.

A failure to put a railing or guard on the outer edge of a curved sidewalk leading to a bridge narrower than the street is gross negligence, for which a city is liable for all damages resulting from its unprotected condition. *Chicago* v. *Gallagher*, 44 Ill. 295. So a town is liable for personal injuries occasioned by the want of a railing along a highway twenty feet wide where the traveled rut was within fourteen inches of the side descent. *Woods* v. *Groton*, 111 Mass. 357. But where broken

brick had been spread over a surface several feet square and a few inches high outside the line of the location of a highway, or if within such line outside of the traveled part of the highway, it will not constitute such a defect therein as will oblige the town to put up a railing for the protection of travelers, or as will render it liable for injuries received by a traveler in falling over them. *Marshall* v. *Ipswich*, 110 Mass. 522.

A town is not liable for damages for an injury to a person by the falling of heavy weights attached to a flag stretched across a highway. *Hewison* v. *New Haven*, 34 Conn. 136. And coasting in highways, though the selectmen have neglected to forbid it, is not an insufficiency of a highway which would render a town liable for injuries by reason thereof. *Hutchinson* v. *Concord*, 41 Vt. 271. An object in a highway, as newly split-stone, which by its bright appearance would frighten an ordinarily well-trained horse, is not a defect that would render the town liable for damage, unless so located in the road as to endanger a collision. *Cook* v. *Montague*, 115 Mass. 571.

From a well-defined and safe road there was a passageway, within the limits of a highway, leading round to a watering-trough, and coming into the road beyond. The trough was within the limits of the highway and had been placed there without the authority of the town. The plaintiff drove from the highway around the passageway to the trough, for the purpose of watering his horse, and while leaving the trough, the horse drew the carriage wheel upon a rock lying in its original place in the passageway, whereby the plaintiff's wife was thrown upon the trough and injured. There was nothing in the passageway calculated to deceive or entrap travelers into concealed danger, and the way was only used for the purpose of watering animals. It was held that the town was not liable for the injury to the plaintiff's wife. *Hall* v. *Unity*, 57 Me. 529.

What constitutes an insufficiency in a highway is matter of fact, to be determined by the jury, under proper instructions. *Washburn* v. *Town of Woodstock*, 49 Vt. 503; *Howard* v. *Mendon*, 117 Mass. 585; *Chappell* v. *Oregon*, 36 Wis. 145; *Congdon* v. *Norwich*, 37 Conn. 414.

A city is liable for injuries resulting from its neglect to provide adequate lights for a bridge over a stream which crosses a street within the limits of the city. *Chicago* v. *Powers*, 42 Ill. 169. It is liable in damages for an injury resulting from a defective sidewalk. *Bloomington* v. *Bay*, 42 Ill. 503. And it is not exonerated from this liability by any statutory provisions for the payment of the expenses of the repairs by the abutting lot-owners. *Cuthbert* v. *Appleton*, 22 Wis. 642.

The commissioners of highways of adjoining towns are jointly liable

for an injury caused by their neglect to keep in repair a bridge across a stream forming the boundary line between the towns, which had been erected and maintained as a joint-bridge between said towns, the commisssioners being shown to have sufficient funds in their hands for the purpose of repairing such bridge. *Bryan* v. *Landon*, 5 N. Y. Sup. Ct. (T. & C.) 594; S. C., 3 Hun, 500.

Where one mistook a private way for a public way, and after proceeding thereon over fifty feet, in attempting to turn back, was injured by a defect therein, it was held that the town was not liable therefor, although there was no fence or sign to mark the deviation of the private way. *Chapman* v. *Cook*, 10 R. I. 304; 14 Am. Rep. 686; approving, 43 Vt. 446. But where a highway had become impassable by a freshet, and the selectmen, through one of their number, who had by them previously been placed in supervision of the town interests in his neighborhood, put up barriers to turn the travel around the dangerous portion of the highway, and over a hill road which was a private way not adopted by the town, such temporary adoption of the private way as a substitute rendered the town liable for damage occasioned by its insufficiency and want of repair, and the private way thereby became a substitute for all travelers, as well as those who had occasion to use it in going to and from houses situate thereon, as those who used it to pass around the dangerous portion of the highway. *Dickinson* v. *Rockingham*, 45 Vt. 99. And generally a town is liable for injuries from a defect outside of the traveled portion of the highway, if the traveler uses due care, and is obliged by an obstruction in the traveled track to deviate threfrom. *Kelley* v. *Fon du Lac*, 31 Wis. 179.

A town or city is not liable for injuries resulting from a sudden defect of a highway or sidewalk unless by reasonable diligence the authorities might have become aware of its existence. Actual or presumed notice must be proved. *Ward* v. *Jefferson*, 24 Wis. 342; *Kenyon* v. *City of Indianapolis*, 1 Wils. (Ind.) 129; *Palmer* v. *Portsmouth*, 43 N. H. 265; *Dodge* v. *Stacy*, 39 Vt. 558; *Dorlon* v. *Brooklyn*, 46 Barb. 604. And, having notice of the obstruction, they should have reasonable time and opportunity to remove the same. *Spear* v. *Lowell*, 47 Vt. 692; *Palmer* v. *Portsmouth*, 43 N. H. 265; *Winn* v. *Lowell*, 1 Allen, 177. But the fact that the danger to travelers from a defect in a highway has been increased through the ordinary action of the elements, within twenty-four hours before an accident occurring from the defect, does not affect the liability of the town therefor. *Blood* v. *Hubbardston*, 121 Mass. 233. And, although notice of a defect may be inferred from the length of time during which the defect has existed (*Holt* v. *Penobscot*, 56 Me. 15), yet an instruction to

the jury in an action for an injury caused by a defective highway, to the effect that if the jury should find that the defect which occasioned the injury was open and visible during the whole of a certain month, then that fact would constitute sufficient notice to the authorities of the defect and render them liable, is erroneous, because there is no rule of law prescribing for what length of time the continuance of a defect shall constitute notice of the existence of such defect. *Colley* v. *Westbrook*, 57 Me. 181; 20 Am. Rep. 30.

§ 21. **Action for injury arising from defects in highways.** To render a town or city liable for an injury sustained on a highway, it must have been sustained by a *traveler;* and the defect of the way either alone or combined with some matter of pure accident for which the traveler was not in fault must have been the sole cause of the injury. *Hawes* v. *Fox Lake*, 33 Wis. 438; *Cumings* v. *Centre Harbor*, 57 N. H. 17. And the person bringing the action must show a special and peculiar injury to himself not common to the public. The fact that his injury is greater in degree than that to others does not entitle him to maintain it. The injury must be special. It may be to more than one person, but it must not embrace the entire public. *McCowan* v. *Whitesides*, 31 Ind. 235; *Carpenter* v. *Mann*, 17 Wis. 155; *Milarkey* v. *Foster*, 6 Oreg. 378; *Brady* v. *Shinkle*, 40 Iowa, 576. So one who is not injured by the vacation of a highway in any other sense than the public generally, cannot maintain an action for damages therefor. *Ellsworth* v. *Chickasaw Co.*, 40 Iowa, 571. Nor can one maintain an action for obstructing a public way who proves no damage peculiar to himself beyond being delayed several times in passing along it and being obliged in common with every one else attempting to use it, either to go by a less direct way, or to remove the obstruction. *Winterbottom* v. *Lord Derby*, L. R., 2 Exch. 316. And the person bringing the action must cause it affirmatively to appear that ordinary care was exercised in passing over the highway; and if, on the whole testimony on this point, the weight of evidence is clearly against the plaintiff, a new trial will be granted when a verdict has been rendered in his favor. *Gleason* v. *Bremen*, 50 Me. 222; *Rusch* v. *Davenport*, 6 Clarke (Iowa), 443. But see *Hill* v. *New Haven*, 37 Vt. 501, which holds to the contrary. So a person, who voluntarily attempts to pass over a sidewalk which he knows to be very dangerous by reason of ice upon it when he might easily avoid it, cannot maintain an action against the town which is bound to keep the way in repair to recover for injuries sustained by falling upon the ice. *Wilson* v. *Charlestown*, 8 Allen, 137.

A person who, while using a highway simply for the purpose of play, meets with a personal injury by reason of a defect therein, can-

not maintain an action to recover damages therefor against the town or city which is bound to keep the same in repair. *Blodgett* v. *Boston*, 8 Allen, 237. And the same is true where a person receives an injury from a defective highway while using such highway for the express purpose of horse-racing. *McCarthy* v. *Portland*, 67 Me. 167; S. C., 24 Am. Rep. 23. The owner of land adjoining a highway may maintain an action at common law against the town to recover damage caused to his land by the fault or negligence of the town in not building and maintaining the road in a reasonably suitable and proper manner. *Gilman* v. *Laconia*, 55 N. H. 130; 20 Am. Rep. 175.

Where a highway is incumbered with snow, under such circumstances that the town is not in fault, and a person who holds the office of surveyor of the district undertakes to assist a traveler over the incumbrance, the town is not liable if by reason of his want of ordinary care the traveler's horse is injured. *Cofran* v. *Sanbornton*, 56 N. H. 12.

An individual cannot maintain an action against a railroad company for constructing their road so as to obstruct a highway, in which he is interested as one of the public, desiring to use such highway. The liability of the company is to the town for obstructing the highway, and the remedy of the individual is by proceedings against the town for neglect of its duty to keep the highway open and in repair. *Buck* v. *Connecticut, etc., R. R. Co.*, 42 Vt. 370. But see *Gillett* v. *Western R. R. Co.*, 8 Allen, 560.

§ 22. **Defense to such action.** Where corporate authorities are sued for damage caused by their negligence in leaving an obstruction upon a public street, they cannot defend on the ground that the street was not legally established. *Mayor, etc.*, v. *Sheffield*, 4 Wall. (U. S.) 189. But see *Hall* v. *Manchester*, 39 N. H. 295; *State* v. *Blonien*, 36 Wis. 303. And it is no defense that the plaintiff obstructs it on his own land. *Langsdale* v. *Bonton*, 12 Ind. 467. And to an information for obstructing a public highway by keeping empty vehicles standing thereon, in front of the defendant's inn, a user by the defendant of such highway for the same purpose for twenty years is no defense. *Gerring* v. *Barfield*, 16 C. B. (N. S.) 597; *State* v. *Pierson*, 37 N. J. Law, 216. But to an action for obstructing a highway, it is a good defense that the obstruction consists of building material properly placed in the street, and that such use of the street was reasonably necessary at the time and place. *Wood* v. *Mears*, 12 Ind. 515.

It is no defense to an action for an injury caused by a defect in a highway, that the town used ordinary care and diligence in repairing the road, if by such care the road is not made safe and convenient, but remained defective. *Horton* v. *Ipswich*, 12 Cush. 488. Nor is it a

defense to show that at the time the damage was sustained a considerable portion of the roads within the limits of the defendant town had imperfections similar to those which caused the injury, caused by the freezing and thawing of the ground. *Tripp* v. *Lyman*, 37 Me. 250.

The defendant owned a ferry, and one of the ropes used in working it was stretched across part of the public highway, the plaintiff upon the public highway fell over the rope and was injured, for that injury suit was brought and the defendant pleaded that he had leased out the ferry, and that it was worked by the lessee at the time of the injury, and it was held to be a good defense. *Hale* v. *Durant*, 39 Tex. 667.

§ 23. **Contributory negligence.** All persons using streets and sidewalks and other highways have a right to assume that they are in a good and safe condition, and to regulate their conduct upon that assumption. *Kenyon* v. *City of Indianopolis* 1 Wils. (Ind.) 129; *Gillepsie* v. *Newburgh*, 54 N. Y. (9 Sick.) 468; *Bills* v. *City of Ottumwa*, 35 Iowa, 107. And only the same degree of care to avoid accident is required of one passing along the street by night, as by day, although in the former case this may call into exercise greater caution and watchfulness. *Stier* v. *City of Oskaloosa*, 41 Iowa, 353; *Pollard* v. *Woburn*, 104 Mass. 84. And though a traveler upon a highway becomes aware of an obstruction or defect before him, he is not necessarily chargeable with negligence because he attempts to proceed. His right to recover damages for injuries sustained through the defect or obstruction depends, so far as the point of contributive negligence is concerned, not on the question whether he knew of the defect, and might possibly have stopped or avoided it, but whether he had reasonable cause to think he might escape from it by the means which he adopted, and whether he used reasonable care in making the attempt. *Thomas* v. *Western Union Tel. Co.*, 100 Mass. 156; *Smith* v. *St. Joseph*, 45 Mo. 449; *Mahoney* v. *Metropolitan R. R. Co.*, 104 Mass. 73; *Nicks* v. *Marshall*, 24 Wis. 139. So in an action against a town to recover for injuries sustained by the plaintiff, in driving across a horse railway track, where a guard rail was insufficiently fastened, it was held that the fact that he knew of the railway, but took no special care on that account, was not conclusive of a want of due care. There is no presumption of law that a street railway obstructs the ordinary travel on the highway, or makes it dangerous. *Hawks* v. *Northampton*, 121 Mass. 10. So, too, the fact that one, when injured by a defect in a highway, was, in violation of a statute, attempting to drive his carriage past another carriage traveling in the same direction, does not prevent a recovery in the absence of negligence or other fault on his part, although the fact is competent evidence for the jury on the question of negligence. *Damon*

v. *Scituate*, 119 Mass. 66; 20 Am. Rep. 315. And the circumstances of the case were considered to warrant a finding, that a girl eighteen years old was in exercise of the ordinary prudence of her sex and age, in attempting to pass a horse and coal cart obstructing a street near an embankment not guarded by railing. *Snow* v. *Provincetown*, 120 Mass. 580.

There is no rule that a person, injured by being thrown from his wagon in consequence of defects in the highway when his horses were running away, cannot recover if it is shown that the same horses had often run away before. The question is for the jury whether he was using reasonable care when the injury occurred. *City of Centralia* v. *Scott*, 59 Ill. 129. See *Ring* v. *City of Cohoes*, 13 Hun (N. Y.), 76; *Baldwin* v. *Greenwoods Turnpike Co.*, 40 Conn. 238; 16 Am. Rep. 33.

Where a young girl was injured at night by falling from a highway into a ditch dug by her father's landlord, for the purpose of draining the premises, it was held that even if she were a "traveler," the negligence of her father in permitting the ditch to remain uncovered would preclude her from recovering from the town for the injury. *Leslie* v. *Lewiston*, 62 Me. 468.

§ 24. **Damages recoverable.** Interest, it is held, cannot be added to the sum found as damages, by the jury, from a defect in a highway. *Sargent* v. *Hampden*, 38 Me. (3 Heath.) 581. And the amount of damages claimed under the Maine act of 1876, ch. 97, for an injury resulting from a defect in the highway, need not be stated in dollars and cents in the notice. *Sawyer* v. *Naples*, 66 Me. 453.

In an action for an injury to the plaintiff's horse from getting one foot into a hole in a defective bridge, evidence of the animal's value before and after the accident is admissible, also of the condition of his legs within a week afterward, and also of his safe and kind disposition previously, and his timid conduct subsequently, as to crossing bridges. *Whitely* v. *Inhabitants of China*, 61 Me. 199.

In an action by a husband and his wife to recover for injuries to her from a defective highway, an instruction prayed for, that the jury might consider the probable shortening of her life, also future medical expense, also loss to him of her future labor, was refused, and the refusal sustained. *Colby* v. *Inhabitants of Wiscasset*, 61 Me. 304.

As to matter of damages, see Vol. II, pp. 431, 471.

## ARTICLE II.

### USE OF HIGHWAYS.

**Section 1. In general.** Generally, the only legitimate use that can be made of a street, or a sidewalk, or other highway, by a private person (not an owner of adjoining land), is that of passing and repassing. *Smith* v. *City of Leavenworth*, 15 Kans. 81; *Stinson* v. *Gardiner*, 42 Me. 248. But highways may lawfully and properly be used for other purposes than the accommodation of the public travel, provided such use be not inconsistent with the reasonably free passage of the public over them. They are designed and constructed for general convenience, and may be used, as they have ordinarily been accustomed to be used, without nuisance. Time and necessity, as well as locality, are important elements in determining the character of any particular use of a highway. *Graves* v. *Shattuck*, 35 N. H. 257.

§ 2. **Rights in using highway.** A party having before him the whole road free from obstructions, and having no notice of any carriage behind him in season to stop, or change his course, is at liberty to travel on any part of the road that he pleases. *Foster* v. *Goddard*, 40 Me. 64; *Smith* v. *City of Leavenworth*, 15 Kans. 81. He has a right to expect from others ordinary prudence, at least, and to rely upon that in determining his own manner of using the road; not to justify his own foolhardiness, but to warrant him in pursuing his own business in a convenient manner. *Harpell* v. *Curtis*, 1 E. D. Smith (N. Y.), 78. Children are not restricted in passing and repassing upon the streets and roads more than adults. *Stimson* v. *Gardiner*, 42 Me. 248. A lot owner, or any person under him, has a right to use any portion of a street in front of his lot in passing to or from his lot, and to and from the improvements on the same, including the house, cellar, etc. *Smith* v. *City of Leavenworth*, 15 Kans. 81. But the right of the public in a highway, even so ancient that its origin is unknown, is ordinarily limited to an easement for the purposes of travel. *Boston* v. *Richardson*, 13 Allen, 146.

A highway is a public way for the use of the public in general, for passage and traffic, without distinction. Persons making use of horses as the means of travel or traffic by the highways have no rights therein superior to those who make use of them in other permissible modes; improved methods of locomotion are admissible, and cannot be excluded from existing public roads, if not inconsistent with the present methods. *Macomber* v. *Nichols*, 34 Mich. 212; 22 Am. Rep. 522. So, if one in making use of horses as the means of locomotion on the high-

ways is injured by the act or omission of another using a steam locomotive, the question is not one of superior privilege, but whether, under all the circumstances, there is negligence imputable to some one, and, if so, who should be accountable for it. Id. Where two parties, each without any better right than the other, strive to occupy the same place in the public highway, he is in the wrong who first uses force. *Goodwin* v. *Avery*, 26 Conn. 585.

§ 3. **Duties and liabilities in using.** When a driver attempts to pass another on a public road, he does so at his peril. At least, he must be responsible for all damages which he causes to the one whom he attempts to pass, and whose right to the proper use of the road is as great as his, unless the latter is guilty of such recklessness or even gross carelessness as would bring disaster upon himself. *Avegno* v. *Hart*, 25 La. Ann. 235; 13 Am. Rep. 33. So, if a party be found with his vehicle upon the half of the road to which he has not the right, another, in passing, or attempting to pass, cannot carelessly or imprudently rush upon him, or his vehicle, and if he has sustained damage in the rash act he cannot maintain an action for the injury. If an attempt to pass in such case would be reasonably safe and prudent, it may probably be made, and if damage ensue, an action will lie for redress. But if such attempt would not be reasonably safe and prudent, it is the duty of the traveler to delay, and seek redress by action for any injury sustained by the detention. *Brooks* v. *Hart*, 14 N. H. 307.

A person driving a vehicle across a street is bound to see that he does not interfere with others in the proper exercise of their right of passing. *Fales* v. *Dearborn*, 1 Pick. 345.

A builder depositing earth or material in a street or highway opposite his lot is only bound to use ordinary care and diligence for its removal within a reasonable time, not to remove it as soon or as fast as may be absolutely possible. *Hundhausen* v. *Bond*, 36 Wis. 29. If such earth be dangerously extended or insufficiently guarded, or allowed to remain an unreasonable time, the obstruction becomes as much a nuisance as if placed there without color of right. *Hundhausen* v. *Bond*, 36 Wis. 29.

§ 4. **Law of the road.** It is the right of every person to travel on any part of the highway that may suit his taste or convenience, not occupied by another, provided no one meets him with a vehicle having occasion or a desire to pass him. *Brooks* v. *Hart*, 14 N. H. 307; *Smith* v. *Gardner*, 11 Gray, 418; *Grier* v. *Sampson*, 27 Penn. St. 183; *Pluckwell* v. *Wilson*, 5 Car. & Payne, 375. But where two persons are traveling with carriages, etc., and are about to meet on the

road and pass each other, each is bound to pass to the right of the center of the traveled road, and in so doing to use ordinary care and caution, and if one of them by omitting this care be injured in his person or property, he is without legal remedy (*Lane* v. *Crombie*, 12 Pick. 176; *Parker* v. *Adams*, 12 Metc. 415); and if he injure the other without the fault of that other, he will be liable to him for damages. *Palmer* v. *Barker*, 11 Me. 338; *Simmonson* v. *Stellenmerf*, 1 Edm. (N. Y.) Sel. Cas. 194. In an action for an injury on a highway alleged to have been caused by the defendant's negligence, the burden is on the plaintiff, not only to show negligence and misconduct on the part of the defendant, but ordinary care and diligence on his own part. *Lane* v. *Crombie*, 12 Pick. 176; *Parker* v. *Adams*, 12 Metc. 415; *Daniels* v. *Clegg*, 28 Mich. 32. Every traveler on a highway has a right to presume that one whom he sees approaching will comply with the law of the road directing the manner of passing, and will not be precluded from recovering damages for a collision resulting from the other's want of care and skill, merely because, when first observing him approaching the injured party had ample space to pass in safety. *Wood* v. *Luscomb*, 23 Wis. 287. But where a person on foot, on horse-back, or in a light vehicle, can pass with safety to the left of a heavily loaded team, it is his duty to give way and leave the choice to the more unwieldy vehicle. *Grier* v. *Sampson*, 27 Penn. St. 183. See *Wrinn* v. *Jones*, 111 Mass. 360; *Washburn* v. *Tracy*, 2 D. Chip. (Vt.) 128. And this rule applies where a person on horse-back meets a buggy carrying three persons and drawn by a single horse. *Beach* v. *Parmeter*, 23 Penn. St. 196.

A mail stage-coach is protected by act of congress from obstruction, but is subject in all other respects to the law of the road. *Bolton* v. *Colder*, 1 Watts, 360. But vehicles, not moving or passing, are not required to occupy any particular part of a turnpike road. *Johnson* v. *Small*, 5 B. Monr. 25. And the law of the road, as it is commonly termed, does not apply to buildings that are being moved through a public highway. *Graves* v. *Shattuck*, 35 N. H. 257. The "center of the road," under the New York acts, requiring all persons meeting each other on any turnpike road or public highway to drive "to the right of the center of the road" means the right of the center of the worked part of the road, although the whole of the smooth and most traveled part may be upon one side of that center. *Earing* v. *Lansingh*, 7 Wend. 185.

Where two alternatives are presented to a traveler upon the highway as modes of escape from a collision with an approaching traveler, either of which might be fairly chosen by an intelligent and prudent

person, the law will not hold him guilty of negligence for taking either. *Larabee* v. *Sewall*, 66 Me. 376.

In England, the customary rules of driving are: 1st, that in meeting, each party shall bear or keep to the left, which is the reverse of the rule in this country; 2d, that in passing the foremost person bearing to the left, the other shall pass on the off side; 3d, that in crossing, the driver coming transverse shall bear to the left hand so as to pass behind the other carriage. These rules seem equally applicable to cases of persons on horseback as well as to persons driving carriages. Angell on Highways, 411; 2 Steph. N. P. 984; Petersdorf's Abr. 55 *n.*; *Wayde* v. *Carr*, 2 Dow. & Ry. 255; *Turley* v. *Thomas*, 8 Car. & Payne, 103.

§ 5. **Rights of foot passengers.** Foot passengers and those driving in carriages have equal rights in the streets of a city and in other highways, and both are required to exercise that degree of care and prudence which the circumstances of the case demand. *Brooks* v. *Schwerin*, 54 N. Y. (9 Sick.) 343; *Coombs* v. *Purrington*, 42 Me. 332. See *Boss* v. *Litton*, 5 C. & P. 407; *Leame* v. *Bray*, 3 East, 593; *Cotton* v. *Wood*, 8 Scott (C. B., N. S.), 568. But it is the duty of drivers of horses to turn aside or stop their teams if necessary whatever cost of property it may occasion, to avoid doing an injury to people who may be crossing or standing in their path. *Barker* v. *Savage*, 1 Sweeny (N. Y.), 288.

A foot traveler, who attempts to cross a public thoroughfare ahead of approaching vehicles under circumstances requiring a close estimate of his chance of crossing safely, cannot recover for injuries sustained in consequence of negligence on the part of the driver of a vehicle, concurring with his own mistaken estimate. *Belton* v. *Baxter*, 14 Abb. (N. S., N. Y.) 404.

§ 6. **Rate of speed.** Driving at an immoderate rate of speed is, in itself, a culpable negligence for which, if an injury results without fault of the person injured, the author is liable. What is immoderate speed is a question for the jury and depends upon the circumstances and place. See *Stokes* v. *Saltonstall*, 13 Peters, 181. In the absence of a statute regulating the manner in which persons should drive when they meet at the junction of two streets, the rule of the common law applies and each person is to use due and reasonable care adapted to the circumstances and place to prevent accident. *Garrigan* v. *Berry*, 12 Allen, 84.

§ 7. **Stopping by the way-side.** It is the right of travelers to stop temporarily by the road-side for their own personal convenience, or for the purpose of lading and unlading their carriages, but this right must

be strictly subordinated to the primary use of highways as thoroughfares for travel. See *Rex* v. *Russell*, 6 East, 427; *Rex* v. *Cross*, 3 Campb. 225; *Park* v. *O'Brien*, 23 Conn. 339; *McCahill* v. *Kip*, 2 E. D. Smith, 413.

A person journeying on a highway does not necessarily forfeit his rights as a traveler by temporarily leaving his horse and wagon in charge of a boy of twelve. *Britton* v. *Cummington*, 107 Mass. 347. And see *Goodman* v. *Taylor*, 5 Car. & Payne, 410.

§ 8. **Roadworthiness.** Formerly the rule was that the plaintiff, as against the town in a suit for injuries caused by a defective road, guarantees against all defects latent or patent in his wagon, harness and horse. Ang. on Highways, 427. But now in most of the States the traveler is not bound to see to it that his carriage and harness are always perfect, and his team of the most manageable character and in the most perfect training, before he ventures upon the highway. *Hunt* v. *Town of Pownal*, 9 Vt. 411; *Ward* v. *Town of North Haven*, 43 Conn. 148; *Winship* v. *Enfield*, 42 N. H. 197; *Lower Macungie Township* v. *Merkhoffer*, 71 Penn. St. 276; *Manderschid* v. *City of Dubuque*, 25 Iowa, 108; *Ring* v. *City of Cohoes*, 13 Hun (N. Y.), 76.

§ 9. **Collisions.** If a collision on a highway occur, and an injury ensues, and if there has been mutual negligence, the party injured will not be entitled to recover except where he could not, by the exercise of ordinary care, have avoided the injury, or where the injury is the result of an intentional wrong on the part of the defendant, or of such gross negligence and want of care as in law is equally culpable. And whether, by the operation of this rule, the injured party shall be barred of his action, is a question of fact to be determined in each particular case by the jury under the direction of the court. Ang. on Highways, 441; *Kennard* v. *Burton*, 25 Me. 39. The mere fact of a man's driving on the wrong side of the road is no evidence of negligence, in an action brought against him for running over a person who was crossing the road on foot. *Lloyd* v. *Ogleby*, 5 C. B. (N. S.) 667.

§ 10. **Contributory negligence.** In the use of a public highway, a party has a right to expect from others ordinary prudence and to rely upon that in determining his own means of using the road; he has a right to travel upon any portion of it, except when about to meet and pass another vehicle, when he must seasonably turn to the right of the middle of the traveled part of the road. If an injury occurs, resulting from another's negligence in driving, he cannot recover where he is guilty of contributory negligence; the burden of proof is upon him to show, not only negligence and misconduct on the part of the other, but also ordinary care and diligence on his own part. *Daniels* v. *Clegg*,

28 Mich. 32; *Brooks* v. *Hart*, 14 N. H. 307. The law imposes the duty upon every one, when upon a public highway, to use reasonable care and diligence to avoid threatened danger, and to protect himself and property therefrom, and for this purpose he is bound to use all his senses, and one who does not use his senses is guilty of contributory negligence if he be injured by the negligence of another thereon. *Gray* v. *Second Ave. R. R. Co.*, 2 J. & Sp. (N. Y.) 519. So, in a case where the plaintiff, desiring to cross an avenue in the city of New York, saw a car approaching rapidly and behind it a car traveling still more rapidly and hurried on making his calculation, as he testified, to pass in front of the car "before the cart could get up," and he had just passed ahead of the horses attached to the car when he came in contact with the cart and was injured, it was held, in an action to recover damages against the owners of the cart, that the plaintiff was not entitled to recover; that it was negligence *per se* for a foot passenger to attempt to cross a public thoroughfare ahead of vehicles of any kind under such circumstances, upon nice "calculations" of the chances of injury. *Belton* v. *Baxter*, 54 N. Y. (9 Sick.) 245.

If a party be found with his vehicle upon that half of a road to which he has not the right, another in passing, or attempting to pass, cannot carelessly or imprudently rush upon him or his vehicle, and if he sustain damage in the rash act, he cannot maintain an action for the injury. *Brooks* v. *Hart*, 14 N. H. 307. Where a traveler selects one of two alternatives of escape from collision with an approaching traveler, it is not a question of law unless in extreme cases and where the facts are undisputed which alternative he should select; but it is a question for the jury, whether, in making his selection, he acts with ordinary care. *Larrabee* v. *Sewall*, 66 Me. 376.

In an action against a town by a traveler for an injury sustained while violating the statute requiring him to turn to the right in passing, etc., it is erroneous to instruct the jury that the burden is on the plaintiff to show that there existed such an emergency or difficulty in the way as made it reasonably impracticable for him to pass to the left of the vehicle ahead of him. *Smith* v. *Conway*, 121 Mass. 216.

Though a statute requires a traveler to keep to the right, yet it does not justify him in stubbornly keeping on that side and thus causing a collision which a slight change on his part might have avoided. *O'Maley* v. *Dorn*, 7 Wis. 236.

§ 11. **Going over adjoining lands.** A person traveling on a public highway which has become founderous and impassable has a right to remove enough of the fences in the adjoining close to enable him to pass around the obstruction, doing no unnecessary injury; but he be-

comes a trespasser if he tears away other fences and tramples down the herbage in other parts of the close. *Williams* v. *Safford*, 7 Barb. 309; 1 Saund, 323, note 3; *Bullard* v. *Harrison*, 4 M. & S. 387; 2 Bl. Com. 36; 3 Kent's Com. 424.

Highways being established for public service and for the use and benefit of the whole community, a due regard for the welfare of all requires that when temporarily obstructed, the right of travel should not be interrupted. And this right, therefore, rests upon the maxim of the common law, that where public convenience and necessity comes in conflict with private right, the latter must yield to the former. Its exercise may also be justified upon the familiar doctrine that inevitable necessity or accident may be shown in excuse for an alleged trespass. If a traveler in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the traveled paths so that he cannot reach his destination without passing upon adjacent lands, he is under a necessity so to do; that is to say, the act to be done can only be accomplished in that way. Such a temporary and unavoidable use of private property must be regarded as one of those incidental burdens to which all property in a civilized community is subject. *Campbell* v. *Race*, 7 Cush. 408; Ang. on Highways, 445.

§ 12. **Actions for injuries.** See *ante*, §§ 3–10 inclusive. In trespass for driving the defendant's wagon against the plaintiff's carriage, the plaintiff's evidence tended to show that it was through the defendant's fault and the defendant's evidence tended to show that the collision was without his fault, but by reason of the plaintiff's horse backing the carriage on to his wagon as he was passing, and it was held that these latter facts, if proved, constituted a good defense. *Howard* v. *Tyler*, 46 Vt. 683.

In an action for injuries caused by a horse taking fright on the highway at an engine being propelled by steam, it is error to permit the right of recovery to turn upon the question whether the engine was calculated to frighten horses of ordinary gentleness. *Macomber* v. *Nichols*, 34 Mich. 212; 22 Am. Rep. 522.

§ 13. **Damages.** See Vol. 2, tit. Damages. Exemplary damages may be recovered for the willful act of the defendant in so managing his horse and carriage as to bring them into collision with, and cruelly wound and injure the plaintiff's horse. *Lewis* v. *Bulkley*, 4 Daly (N. Y.), 156.

## ARTICLE III.

### PRIVATE WAYS.

**Section 1. In general.** A right of way over another's ground may arise from necessity, by grant, or by prescription, but the necessity must be an actual necessity, not a mere inconvenience. The right from necessity or by grant derives no strength from time or occupation. *Lawton* v. *Rivers*, 2 McCord, 445; *Sanxay* v. *Hunger*, 42 Ind. 44; *Derrickson* v. *Springer*, 5 Harr. (Del.) 21. The way is either in gross, that is attached to the person using it, or appurtenant, or annexed to and passing with a conveyance of the estate. But it is never presumed to be in gross when it can be construed to be appurtenant to the land. Ways are appurtenant when they are incident to an estate (one terminus being on the land of another), inhere in the land, concern the premises and are essentially necessary to their enjoyment. They are of the nature of covenants running with the land, must respect the thing granted, and concern the land or estate conveyed. *Sanxay* v. *Hunger*, 42 Ind. 44; Washb. on Easem. 217. A way in gross cannot be turned into a way appendant and *vice versa*. A right of way in gross is a right personal to the grantee, and cannot be made assignable or inheritable by any words in the deed by which it was granted. *Boatman* v. *Lasley*, 23 Ohio St. 614. It is so exclusively personal that the owner of the right cannot take another person into partnership with him. 3 Kent's Com. 420. Whether the grant of a right of way be in gross or appurtenant to some other estate must be determined from the grant itself, and not by matters *aliunde*. *Wagner* v. *Hanna*, 38 Cal. 111.

A right of way appurtenant to land is appurtenant to the whole, and to every part of it; and, if such land be divided, and conveyed in separate parcels, a right of way thereby passes to each of the grantees. *Underwood* v. *Carney*, 1 Cush. 285; *Lansing* v. *Wiswall*, 5 Denio, 213; *Watson* v. *Bioren*, 1 S. & R. 227. So, where the owner of a block in a city makes partition of the same among several persons, and in each deed makes an alley running through the block the boundary of the lots, each proprietor becomes entitled to a private right of way in the alley, and to an action for its disturbance. *Carlin* v. *Paul*, 11 Mo. 32. The use of the words "heirs or assigns" is not essential in order to make a right of way reserved in a contract of partition appurtenant to the land. *Karmuller* v. *Krotz*, 18 Iowa, 352.

A way in gross may be granted to one and his heirs, or it may accrue to him and his heirs by a reservation in his own deed, conveying the land in which the way is reserved. *White* v. *Crawford*, 10 Mass. 183.

And if by reservation describing the *termini*, it may be considered as creating a right of way appurtenant to the farm, which will pass to its occupants. Id. It is not necessary that the common convenience should be promoted in order to authorize the establishment of private ways. *Pettengill* v. *County Commissioners*, 21 Me. 377.

A right of way is but an incorporeal hereditament, an easement which *per se* does not divest the owner of the fee of the land; and, for every other purpose, except the use of servitude as a way, the soil belongs to him, and he is entitled to the same remedies for an injury to his residuary interest that he would be entitled to if it was entire and absolute. *Gidney* v. *Earl*, 12 Wend. 98. So, a grant of way across a man's land conveys no right to the soil, rocks, or other things within the bounds of the way. *Jamaica Pond* v. *Chandler*, 9 Allen, 159, 164.

A right of way over the land of an individual may be exercised and acquired by the inhabitants of a town. *Nudd* v. *Hobbs*, 17 N. H. 524. The laying out of a "private way for the use of one or more of the inhabitants" of a town, by the selectmen or county commissioners, is subject to be used by the public, and is valid, although the whole damages to the owner of the land over which the way is laid out are awarded to be paid by the person to whose house it leads. *Denham* v. *County of Bristol*, 108 Mass. 202. A neighborhood road is not a private road, and the question whether the right of eminent domain may be exercised to take land for a private road is not applicable to such a case. *Kissinger* v. *Hauselman*, 33 Ind. 80.

The right of way through an alley is a discontinuous servitude, and can under no circumstances result from the "*destination du père de famille.*" *Cleris* v. *Tieman*, 15 La. Ann. 316.

In Pennsylvania, a private road must have for its principal terminus the plantation or dwelling of the petitioner. *Killbuck Private Road*, 77 Penn. St. 39.

An easement of way, which has been extinguished by the union of title and possession of the dominant and servient estate in one owner may be revived and pass with the dominant estate. The elements of the rule which work such revivor of way are that the way must be apparent and necessary, though not strictly so, to the enjoyment of the estate granted, and the use continuous. *Brown* v. *Berry*, 6 Coldw. (Tenn.) 98.

§ 2. **Created by grant.** In general a grant of a right of way would be made by deed. But there is a difference in this respect between grants of land to which a way is appendant, and a grant of way in gross. In the first case, although there were a parol lease for less than three years, the way would pass, according to the rule that whatever is inci-

dent to land passes by the description of the land, but in the second case it goes with the person, and must take effect by deed. Woolrych on Ways, p. 15; 2 Rol. Abr. 60; *Beaudely* v. *Brooks*, Cro. Jac. 189. A right of way appendant to land conveyed will pass by the deed of conveyance, and not by a separate quit-claim deed. *Moore* v. *Crose*, 43 Ind. 30.

It is a principle of law that nothing passes as incident to the grant of an easement, but what is requisite to the fair enjoyment of the privilege. *Lyman* v. *Arnold*, 5 Mas. (C. C.) 195. A right of way for one purpose does not necessarily include a right of way for another purpose. The extent of the right must depend upon the circumstances. *Ballard* v. *Dyson*, 1 Taunt. 279. But the grantor is bound to afford reasonable facilities for the enjoyment of the way by the grantee. *Bakeman* v. *Talbot*, 31 N. Y. (4 Tiff.) 366.

A grant of an estate with "ways heretofore used" or "ways in use," or the like, passes all existing ways in actual use at the time, whether the same are used by the grantor over other parts of his own estate, and so are not properly appurtenant to such granted parcel, or are appurtenant to the same, by having been in use over the land of another. Washb. on Easements, 225. And evidence *aliunde*, by parol or otherwise, may be given to prove that a particular way was then in use by the grantor, and then it is held to pass as parcel of the estate conveyed. *White* v. *Crawford*, 10 Mass. 183; *Salisbury* v. *Andrews*, 19 Pick. 250; *Atkins* v. *Boardman*, 2 Metc. 457. But a mere reference in a deed to an intended way without an express grant will not pass such way. But, if owners of lands survey and map them into lots, with a road marked out as separating them, describing the lots by their numbers and reference to the map, a right of way passes as appurtenant to the land. *Smiles* v. *Hastings*, 24 Barb. 44; S. C. affirmed, 22 N. Y. (8 Smith) 217; *Bissell* v. *N. Y. C. R. R. Co.*, 23 N. Y. (9 Smith) 61.

Land may pass in a deed as appurtenant to land if such appears to have been the intention of the parties. *Case of a Private Road*, 1 Ashm. (Pa.) 417. And where land is granted, with a right of way, the right is appurtenant to any part of the land, and the grantee of any part of the land is entitled to it, but the extension of a right of way to objects not originally contemplated by the parties is looked upon unfavorably by the law. Id. If a right of way appurtenant to land is plainly conveyed by deed, it cannot be shown by parol that it was not the intention of the parties to convey it. *Shepherd* v. *Watson*, 1 Watts, 35.

A right of way devised in express terms is appurtenant to the dominant estate, and passes by a conveyance of such estate without express

mention of the appurtenances. It is a charge upon the servient premises, and continues such when they are in the hands of any subsequent purchaser, and it is not impaired by the fact that the owner of the dominant estate has a mere permission, revocable at any time, to pass over the lands of a third party in order to reach the dominant estate. *Lide* v. *Hadley*, 36 Ala. 627.

A conveyance, by deed of warranty in the usual form, of land bounded on a passageway which has never been used as a public or private way, conveys no right of way therein, unless the grantor has the fee or a right of way in it. *Brainard* v. *Boston, etc., R. R. Co.*, 12 Gray, 407. See *Parsons* v. *Johnson*, 68 N. Y. (23 Sick.) 62; 23 Am. Rep. 149.

Where a farm is conveyed "with the free and uninterrupted use, liberty and privilege of passing and repassing in the usual passageway;" and it was shown that a gate had been maintained forty years before the grant, across the passageway, and that it was necessary to keep the cattle from escaping upon the highway, and that it still existed at the time of the grant, it was held that the grant gave a right of way subject to the gate. *Garland* v. *Furber*, 47 N. H. 301.

Where one having a colliery lying between two public roads set out a way from one to the other, passing by the colliery, it was held that a grant of land bounded on said way, with the right to use the "way leading to said colliery" gave a right to use the way on either side of the colliery, including a part thereof which at the time of the grant was only staked out. *Wood* v. *Stourbridge R. Co.*, 16 C. B. (N. S.) 222.

A grant of "liberty to pass and repass over my land where it is necessary," confers a right of way to and from those lands only which the grantee owns at the date of the deed, and the burden of proof is on him and those claiming under him, if sued as a trespasser, to show what those lands were. *Smith* v. *Porter*, 10 Gray, 66.

On a severance of two tenements, no right to use ways, which during the unity of possession have been used and enjoyed in fact, passes to the owner of the dissevered tenement, unless there be something in the conveyance to show an intention to create the right to use these ways *de novo*. The same rule in this respect applies to a will as to a deed. *Pearson* v. *Spencer*, 1 B. & S. 571.

A perpetual way over one farm as appurtenant to another cannot be granted by parol, and a license by parol to use such way is revocable, notwithstanding it has been executed by the licensee's expenditure of money and labor in building it, and without payment or tender to the licensee of the amount so expended by him. *Foster* v. *Browning*, 4 R. I. 47.

§ 3. **Created by reservation.** Though it is a general principle that if a man having two parcels of land to one of which he has no access except over the other, and he conveys the accessible parcel, reserving the inaccessible one, a right of way to the latter over the former is reserved to the grantor; yet it does not follow that, if he afterward convey the inaccessible parcel to a third person, such person has by force of the conveyance the same right of way; it will not pass as an appurtenance of the land. *Pierce* v. *Selleck*, 18 Conn. 321; *Smith* v. *Higbee*, 12 Vt. 113; *Garrison* v. *Rudd*, 19 Ill. 558. The right of way reserved by the grantor is an easement in gross, which is a mere personal right. Id. But it has been held that where a contract of partition stipulated that one of the partitioners should have the privilege of a road through the land of the other so as to enable him to take the nearest and best road to D., this was an easement annexed to the land and not a mere personal privilege, notwithstanding the use of the words "privilege" and "him." *Karmuller* v. *Krotz*, 18 Iowa, 352.

Where the owner of a farm and dwelling-house leased the same, reserving one chamber in the house, it was held that his right to occupy this chamber gave him no other right to occupy the yard than that of a necessary passage-way to and from said room, and that he was not justified in passing through with a horse and wagon, and removing for that purpose a clothes line placed in the yard by the tenant. *Fort* v. *Brown*, 46 Barb. 366.

When the mode of access to a well, "a free passage to and from," which was reserved in a deed, has been fixed by the assent of the parties to the deed, or by several years' exclusive use of a particular way which presumes such assent, a change of way can only be effected by agreement of the owners of both the dominant and the servient estate, even though the reservation of a way in the deed is in general terms. *Garraty* v. *Duffy*, 7 R. I. 476.

Parol evidence is not admissible to prove the reservation of a right of way that is not reserved by deed. *Collam* v. *Hocker*, 1 Rawle, 108.

§ 4. **By adverse possession or prescription.** A right of way is acquired by adverse enjoyment for a period of time equal to the length of time necessary to have a right of entry on real estate, although during such period the servient estate descended to an infant. *Tracy* v. *Atherton*, 36 Vt. 503. And the practical adoption and use for a long time of a particular route under a right of way granted by deed without fixed and defined limits, if acquiesced in by the grantor, operate to determine the location of the way, as effectually as if the same had been described in the deed. *Bannon* v. *Angier*, 2 Allen, 128. An easement once acquired by adverse enjoyment will not be divested by

asking and obtaining a license to enjoy it. *Tracy* v. *Atherton*, 36 Vt. 503. Open and adverse use for twenty years, although beginning in a trespass, will establish a right of way. *Sibley* v. *Ellis*, 11 Gray, 417; *Blake* v. *Everett*, 1 Allen, 248. In some States the time is twenty-one years, expressed, as we have said, to be in analogy to the statute of limitations. *Krier's Private Road*, 73 Penn. St. 109.

But one who claims to have acquired a right of way by prescription must show affirmatively an uninterrupted user for the requisite length of time; or if the user upon which he relies has been interrupted, he must show that such interruptions were consistent with the title claimed by him (*Plimpton* v. *Converse*, 42 Vt. 712; *Puryear* v. *Clements*, 53 Ga. 233); and when a right of way is proved to exist by adverse enjoyment only, the ordinary use which establishes the right limits and controls it. *Richardson* v. *Pond*, 15 Gray, 387. A right of way, as appurtenant to land, may be acquired by the adverse use, for twenty years together, of several persons in succession who claim under the same title; and a grant of the land "with the privileges thereunto belonging," to have and to hold the same, "with all the privileges and appurtenances," by an owner who has commenced such use, constitutes a sufficient privity of estate to enable the purchaser to avail himself of his grantor's use. *Leonard* v. *Leonard*, 7 Allen, 277.

A right of way by prescription over lands, formerly part of a public highway which has been discontinued, cannot be based upon their use prior to the discontinuance, as in order to give such right the user must be while all persons concerned in the estate are free from disability to resist it. *Wheeler* v. *Clark*, 58 N. Y. (13 Sick.) 267. A right of way by prescription over a passage-way, which has been laid out for other purposes, cannot be established by proof of a use which was consistent with the rights of the owner of the soil, and of those who were entitled to use the way. *Harper* v. *Parish of Advent*, 7 Allen, 478. So the use of a way for more than twenty years over an academy common, with occasional repairs of the way, does not, as matter of law, establish a right by prescription. *Burnham* v. *McQuesten*, 48 N. H. 446. And where, after such twenty years' user, the owner built a fence across the way, inserting a gate for the sole convenience of the scholars, and informed the person so using the way that the act was expressly to prevent such use by him, and no right of way was asserted in reply, it was held that the facts warranted a finding that such user had been permissive and not adverse. Id.

Where a private way is established at the instance and expense of a person, he is not bound to keep it in repair through his own land for

the benefit of those who may have acquired a prescriptive right to use it. *Puryear* v. *Clements*, 53 Ga. 233.

The claimant of a right of private way in an alley can derive no aid from the use of the alley as a private way, with the acquiescence of the defendant, by owners or occupiers of other lots thereon. *Dodge* v. *Stacy*, 39 Vt. 558.

§ 5. **Presumption of grant or dedication.** A grant of a right of way may be presumed from an uninterrupted adverse possession for more than twenty years unexplained. *Hill* v. *Crosby*, 2 Pick. 466; *Worral* v. *Rhoads*, 2 Whart. 427; *State* v. *Gregg*, 2 Hill (S. C.), 387; *Cuthbert* v. *Lawton*, 3 McCord, 194. This right of way is the right to use the surface of the soil for the purpose of passing and repassing, and the incidental right of properly fitting the surface for that use, as by leveling, graveling, ploughing, or paving; but the owner of the soil has all the rights and benefits of ownership, consistent with such easement. *Perley* v. *Chandler*, 6 Mass. 454; *Atkins* v. *Boardman*, 2 Metc. 457. To create the presumption of a grant of the right of way, the circumstances attending its use must be such as to make it appear that it was established for the benefit of the claimant, or that its use was accompanied by a claim of right, or by such acts as manifested an intention to enjoy it without regard to the wishes of the owner of the land. *Hall* v. *McLeod*, 2 Metc. (Ky.) 98. Whether a right of way has been acquired or not, by a long uninterrupted user, is a question for the jury; and where such user is proved, they will be justified in presuming it adverse, unless it be rebutted by proof of license or agreement. *Steffy* v. *Carpenter*, 37 Penn. St. 41. And the facts that the defendants owned a right of way over the plaintiff's land; that the plaintiff obstructed and shut up the way against their will; that he afterward notified them that they might pass over his land by a different way; and that they thereupon adopted and used the new way instead of the old one for several years, the old one remaining obstructed; are ample to warrant a finding that there was a dedication of the new way, in consideration of the surrender of the old one. *Smith* v. *Barnes*, 101 Mass. 275; *Hamilton* v. *White*, 5 N. Y. (1 Seld.) 9. But if the purchaser of land over which there is a right of way by prescription interrupts the way, and his grantor thereupon changes its course, with the intention of making it pass over his own adjoining land, but in fact makes it by mistake to pass over the granted premises, the right of way over the new route will continue, if accepted by those having the right of way, and assented to by the purchaser of the land, but not otherwise; and if the purchaser is under the same mistake as to the boundaries of his land, and supposes that the new route does not pass over the same, his

silence will not justify the inference that he intends to permit the new route to pass over his land. *Gage* v. *Pitts*, 8 Allen, 527. Exclusive and uninterrupted user of a way by the inhabitants of a town for more than twenty years will warrant the presumption of a grant. It will be technically a private way, and any other person than an inhabitant passing on it will be a trespasser. If it is obstructed no indictment will lie for the obstruction; nor will the town be liable to punishment for neglecting to repair it. *Commonwealth* v. *Low*, 3 Pick. 408.

A presumption of a grant of a private way cannot be established by proof of a user by the claimant in common with others for more than twenty years. *Day* v. *Allender*, 22 Md. 511. And a merely permissive use by the public of an alley in subordination to that of the owner's tenants, though for more than twenty years, is not such an adverse use as will constitute a dedication to public use, or an acceptance of a dedication. *Brinck* v. *Collier*, 56 Mo. 160. A private passway cannot be created by dedication; nor can the establishment of a private passway be construed to be a dedication of it to public use. *Hall* v. *McLeod*, 2 Metc. (Ky.) 98. But twenty years' uninterrupted user will create a presumption of the dedication of private property to the public as a highway; and a much shorter period will be sufficient where the act of the owner, from which the dedication is inferred, is clear and unequivocal, and followed by public use. *Denning* v. *Roome*, 6 Wend. 651; *Cook* v. *Harris*, 61 N. Y. (16 Sick.) 448, 454.

No presumption of a grant arises from the adverse enjoyment of an easement against a minor or *feme covert;* but a second disability, added to one which existed when the adverse enjoyment first began, is always disregarded. Thus, a coverture which took place during infancy is not taken into account, after the infancy has ended. *Reimer* v. *Stuber*, 20 Penn. St. 458.

A passage-way which extended from a street along and upon both sides of the dividing line between two lots, and was the only means of access to the back part of either, was used uninterruptedly for twenty years by the owners of both lots, without limit, restriction, interruption or objection, or any claim of right except what might be implied from such use; and no mention of any right of way was made in any of the conveyances of either lot for a much longer time, and it was held from such use that a grant must be presumed, to the owner of each lot, of an easement in that part of the passage-way which was upon the other lot. *Barnes* v. *Haynes*, 13 Gray, 188.

§ 6. **Way by necessity.** A way by necessity derives its origin from a grant, and cannot legally exist where neither the party claiming the way, nor the owner of the land over which it is claimed, or any one

under whom they, or either of them claim, was ever seized of both tracts of land. *Stewart* v. *Hartman*, 46 Ind. 331; *Tracy* v. *Atherton*, 35 Vt. 52; *Pearson* v. *Spencer*, 1 Ellis (B. & S.), 571; *Proctor* v. *Hodgson*, 29 Eng. L. & Eq. 453; S. C., 3 C. L. R. 755; S. C., 24 L. J. Exch. 195. The same principle of necessity which raises the implication of one such way may extend it to two or more; but convenience alone is not sufficient to raise the implication of a way. *Nichols* v. *Luce*, 24 Pick. 102; *Hyde* v. *Jamaica*, 1 Wms. (Vt.) 443; *Seabrook* v. *King*, 1 N. & M. 140. So, a right of way by necessity, through an alley over another's land, does not exist where the party claiming it has an outlet over his own land. *Ogden* v. *Grove*, 38 Penn. St. 487. See *Screven* v. *Gregorie*, 8 Rich. (S. C.) 158. A right of way of necessity arises when the owner of two parcels of land conveys one parcel which is wholly surrounded by the other land of the grantor, or partly by his and partly by land of a stranger. The way is so far appurtenant to the land as to pass with it to the grantee, provided he has no other access to the same. *Brown* v. *Berry*, 6 Coldw. 98; *Hall* v. *McLeod*, 2 Metc. (Ky.) 98; *Pearson* v. *Spencer*, 1 B. & S. 571; *Wissler* v. *Hershey*, 23 Penn. St. 333; *Collins* v. *Prentice*, 15 Conn. 39. But see *Kuhlman* v. *Hecht*, 77 Ill. 570. And a subsequent purchaser of such other land takes it subject to the right of way. *Thomas* v. *Bertram*, 4 Bush (Ky.), 317. This rule that the grantee of land is entitled to a way of necessity over the land of his grantor is applicable where, instead of a formal, there is an equitable grant of the title, with the right of possession. *Simmons* v. *Sines*, 4 Abb. (N. Y.) App. Dec. 246; 4 Keyes, 153. The way should be a convenient one over the adjoining close of the grantor, due regard being had to the interest of both parties. Subject to this rule it would seem reasonable that the grantor should be allowed to assign such way as he could best spare. If he decline or omit, the grantee must select for himself, and the court would no doubt extend a liberal indulgence to the exercise of his discretion. Nothing short of evident abuse ought to invalidate the way thus designated and used, as the grantor or those under him would be in fault for not assigning a way themselves. But under this right, the party cannot set up a claim to the use of several ways over the adjoining close; it cannot be carried beyond the necessity. *Holmes* v. *Seely*, 19 Wend. 507.

It does not necessarily follow from the fact that a party is without a right of way, except over the defendant's land, that he thereby acquires a right of way from necessity according to the principles of the common law. *Brice* v. *Randall*, 7 Gill & Johns. (Md.) 349.

A right of way of necessity is not a perpetually existing right of

way, it is limited by the necessity which created it, and is suspended or destroyed whenever that necessity ceases, and if the grantee or his assigns acquire another convenient way to his lands, by purchase or otherwise, or by the opening of a highway, the necessity ceases, and the right of way founded thereon is consequently terminated. *N. Y. Life Ins. & Trust Co.* v. *Milnor*, 1 Barb. Ch. 353; *Pierce* v. *Selleck*, 18 Conn. 321; *Holmes* v. *Goring*, 9 Moore, 166; S. C., 2 Bing. 76; *Abbott* v. *Stewartstown*, 47 N. H. 228; *Viall* v. *Carpenter*, 14 Gray, 126. And if the owner of land bounded on one side by a highway, and on all other sides by lands of other owners, has a prescriptive right of way over one of the adjoining lots by which he can reach the highway, and he sells that portion of his land which is next to the highway, he retains no right of way by necessity over the same. *Leonard* v. *Leonard*, 2 Allen, 543. It is, however, held in *Pingree* v. *McDuffie*, 56 N. H. 306, that a party having conveyed a portion of his land over which was the only means of access to the remaining land, a right of way by necessity to the remaining land was reserved.

An owner of land to which access can be had only through premises previously conveyed by him cannot claim a right of way by necessity after selling the land to which the right is appendant, although the deed given upon the sale contains a general clause of warranty, but without an express warranty or conveyance of the right of way. *Alley* v. *Carleton*, 29 Tex. 74.

A distribution of an intestate estate, by which a single tract of land was divided among six heirs, contained the following provision: "In making this distribution, we have allowed to each of said heirs a convenient passage across the other lots to and from his and her own, with the least damages to the owner, whenever it shall be necessary for the full enjoyment of his or her own." It was held that the right of way thus given was a way of necessity merely. *Smith* v. *Tarbox*, 31 Conn. 585. And see *Smyles* v. *Hastings*, 22 N. Y. (8 Smith) 217.

If the law of necessity will apply to private ways, *a fortiori*, it will apply to a way between a mill and its dam and race, mills being of great public utility. *McTavish* v. *Carroll*, 7 Md. 352.

Where, in an action for a trespass by the defendant's children in passing over land of the plaintiff in going to and returning from school, it appeared that the school-house was built by and for the public, on a small lot forming part of the tract owned by the plaintiff, and that the children resided in the district, and could not conveniently, and without traveling a very considerable distance, approach without passing over the plaintiff's land, it was held that, until a highway to the school-house was provided, the children had the right, necessarily, to

travel over the land of the plaintiff, in going to and returning from school. *Wilson* v. *Garrard*, 59 Ill. 51.

Under the Kentucky statutes, private passways, in which the public have an interest, may be established, when it is necessary to enable any inhabitant of the State to attend courts, elections, churches, or mills, or to reach an established public highway, but not to enable the owner of one piece of land to cross the land of another, to obtain access to another piece, of which he is the owner. *Robinson* v. *Swope*, 12 Bush (Ky.), 21.

§ 7. **Sale or transfer of.** A deed of land, bounded on all sides by lands of other owners, passes as appurtenant an existing prescriptive right of way over one of the adjoining lots to other land of the grantor and a way by necessity over the latter. *Leonard* v. *Leonard*, 2 Allen, 543. And where by parol agreement the owners of adjacent lots have dedicated an alley to the common use of the lots, and have erected their buildings in reference to the alley, the easement becomes appurtenant to the lot, and is not defeated by the statute of frauds, and a subsequent purchaser of one of the lots takes the easement as an appurtenance. *Rhea* v. *Forsyth*, 37 Penn. St. 503.

Where the owner of land subject to a right of way divides it into several lots, the grantee of each lot, however small, has an equal right of way over the servient land. *Walker* v. *Gerhard*, 9 Phil. (Penn.) 116. And this rule was applied to a grant of a right of way to be used in common over and upon the land of the grantor, on the easterly side of the land conveyed. *Miller* v. *Washburn*, 117 Mass. 371, 376. Where, by a provision in a deed, the grantors were entitled to the use of a private way so long as they "shall continue to own" certain real estate adjoining it, it was held that proceedings in bankruptcy against the grantors, and an assignment therein, no actual disposition having been made of their property, did not terminate their ownership of their real estate within the meaning of the provision. *Colie* v. *Jamison*, 6 N. Y. Sup. Ct. (T. & Ct.) 576; S. C., 4 Hun, 284.

A purchaser under a mortgage of land over which a permanent road had been established by the owner, previous to the execution of the mortgage, is entitled to such road, and where a railroad company have occupied it for their track, under a conveyance from the original owner made subsequently to the mortgage, the purchaser may recover damages against them for obstructing it. *Penn. R. R. Co.* v. *Jones*, 50 Penn St. 417. And where an owner of land, subject to a mortgage, laid it out in lots leaving an alley on one to be used by the other, at a distinct sale thereof under the mortgage, the use of the alley, being apparent, passed with the latter lot, although not mentioned in the sheriff's

deed, and the expectation of the purchaser of the dominant lot to get the alley was immaterial. *Cannon* v. *Boyd*, 73 Penn. St. 179.

Where B., who claimed the right of way over the land of D., after D. had contracted to sell the lands to S., of which contract B. had actual notice, obtained from D. a conveyance, without consideration, of the right of way, it was held that unless there was an existing right of way, the conveyance from D. to B. was subject to the equities between D. and S. *Townsend* v. *Bissell*, 6 N. Y. Sup. Ct. (T. & C.) 565; S. C., 4 Hun, 297.

A way over other land of the grantor in a deed may pass as appurtenant to the land granted, although there are no insuperable physical obstacles to prevent access by another way, if such other way cannot be made without unreasonable labor and expense, and, in determining this question, a jury may consider the comparative value of the land and the probable cost of such a way. *Pettingill* v. *Porter*, 8 Allen, 1.

If the owner of a tract of land sells one-half of it, reserving a right of way across it, and in the same deed grants to the purchaser a right of way across the unsold half, these rights are not annexed to or appurtenant to the respective tracts, and do not pass with the title. *Wagner* v. *Hanna*, 38 Cal. 111.

Where the title to two lots of ground, with an alley between them, running from one street to another, which had been dedicated to the use of the lots bounding thereon by a former owner, became vested in two persons as tenants in common, who continued the use of the alley for many years: the right to use it passes to a purchaser of an inner lot, at a joint sale of the interests of the two tenants in common by the administrator of one after his decease, and the survivor; and the purchaser of the two lots has no right to close it, though the measurement in his deeds extends to the center of the alley, and embraces the whole of it. *McCarty* v. *Kitchenman*, 47 Penn. St. 239.

§ 8. **Of the use of a private way.** A grantee of a way is limited to use his way for the purposes and in the manner specified in his grant. He cannot go out of the limits of his way, nor use it to go to any other place than that described, nor to that place for any other purpose than that specified, if the use in this respect is restricted. *French* v. *Marstin*, 24 N. H. 440; 32 id. 316. The right is not personal to the owner, but is limited to the soil to which it attaches by the terms of the grant. *Shroder* v. *Brenneman*, 23 Penn. St. 348. So a right of way, used for the purpose of taking wood only, cannot be extended to other purposes, upon the dominant estate being occupied by dwellings and cultivated. *Atwater* v. *Bodfish*, 11 Gray, 150. And if the course of the way is designated between certain *termini*, the grantee has no

right to deviate from the course designated, although the way may become impassable from being overflowed or otherwise. *Miller* v. *Bristol*, 12 Pick. 550. But if the right of way be undefined, and the owner of the servient land stops up the way in use, the grantee of the way may go over another part of such land. *Farnum* v. *Platt*, 8 Pick. 339. See *Selby* v. *Nettlefold*, 43 L. J. Ch. 359; S. C., L. R., 9 Ch. App. 111; S. C., 8 Eng. R. 770; 29 L. T. (N. S.) 661; *post*, p. 361. A right of way for all purposes is not restricted to one purpose, because the owner thereof has had occasion for a long series of years to use it for that purpose only. *Holt* v. *Sargent*, 15 Gray (Mass.), 97. And where premises are demised or conveyed "with right of way thereto," it may be a question for the jury what is a reasonable use of such right. *Hawkins* v. *Carbines*, 3 Hurl. & Nor. 914.

If a private way is opened leading from a public street, and prepared for use in the same manner as a public street, and with nothing to show that it is not such, the public may lawfully travel over it, although it is closed at one end; and in so doing they are bound only to the same degree of care, in respect to others who are also lawfully using it, as in traveling over public streets. *Danforth* v. *Durell*, 8 Allen, 242.

The owner of land, over which a right of way "as now laid out" has been granted, has no right, in the absence of evidence of a contrary usage, to erect a gate at the entrance of the way, or to narrow the passage by gate-posts. *Welch* v. *Wilcox*, 101 Mass. 162. See *Brooke* v. *Connery*, 7 Phil. (Penn.) 193. But the grantor of the easement of a passage-way over his land for a foot passage has the right to build over the alley or passage-way, provided he does not obstruct it. *Steverson* v. *Stewart*, 7 Phil. (Penn.) 293.

Where, under a parol consent, given for a sufficient consideration by one only of two adjoining proprietors, a private road is laid out and opened, one-half upon the lands of each for the benefit of a third party, the fact that the proprietor, whose consent was not obtained, closes up that portion of the road which passes over his land, does not annul the consent of the other, but it is still operative and effectual to give a right of way over the land appropriated in pursuance thereof, precisely the same as if the other proprietor had left the portion of the road upon his land undisturbed. The restriction of the travel to the land as to which the consent was given imposes no new burden upon it, and therefore does not affect the rights therein of the party entitled to the way. *Dempsey* v. *Kipp*, 61 N. Y. (16 Sick.) 462. And where proprietors of adjoining lots contribute strips of land to form a lane common for the use of both, and one, after he had acquired a right of

way by prescription over the other's strip, put an obstruction on his own strip, his right of way over the other's land is not destroyed. *Craven* v. *Rose*, 3 So. Car. 72. Where a contract between A. and S., granting to S. a private right of way from S.'s farm across cultivated land of A. to a highway, stipulated that S. should erect and maintain a gate at the west end of the way, but was silent as to any erection at the east end entering the highway; and A. placed a gate at the east end—it was held that S. was bound to close the latter gate as often as he should pass through it. *Amondson* v. *Severson*, 37 Iowa, 602. One or more co-owners of a private way cannot alter the grade thereof, to the detriment of another co-owner without his consent. *Killion* v. *Kelley*, 120 Mass. 47. Where an easement to land has been granted, the use of that easement will be restricted to a reasonable use for the purposes of the land in the condition in which it was when the grant was made. *Wood* v. *Saunders*, L. R., 10 Ch. App. 582; 14 Eng. R. 805, and notes.

Proof that a right of way which exists only by adverse enjoyment was used for a variety of purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate, while substantially in the same condition. *Parks* v. *Bishop*, 120 Mass. 340; 12 Am. Rep. 519.

§ 9. **Injuries or obstruction.** The owner of a private way, by grant or necessity, or by prescription, where the way has been assigned, and which is impassable, even by the acts of the owner of the close through which it passes, cannot pass *extra viam* without being a trespasser. His only remedy is to abate the nuisance and to prosecute for damages. In case of obstruction of public ways, a traveler has a right to pass *extra viam*, but he must only use so much of the adjoining close as is necessary to his passage, and any thing beyond a necessary use is a trespass. *Williams* v. *Safford*, 7 Barb. 309; *Boyce* v. *Brown*, id. 81; *Miller* v. *Bristol*, 12 Pick. 550; *ante*, p. 360. But the contrary of this is held in *Kent* v. *Judkins*, 53 Me. 160; *Leonard* v. *Leonard*, 2 Allen, 543. The grantor of a private way is not bound by implication to construct or keep in repair the way granted. *Walker* v. *Pierce*, 38 Vt. 94. And the grant does not prevent his erection of such gates upon the road at its termini, as are necessary for the beneficial occupation of his land. In an action by the grantee for obstructing the way, his necessity, as regards the situation of the grantor's property, is a question for the jury. *Baker* v. *Frick*, 45 Md. 337; S. C., 24 Am. Rep. 506. And see *Maxwell* v. *McAtee*, 9 B. Monr. 20; *Houpes* v.

*Alderson*, 22 Iowa, 160; *Garland* v. *Furber*, 47 N. H. 331; *Meehan* v. *Barry*, 97 Mass. 447.

The owner of a right of way over a passage-way may, for the purpose of keeping the way fit for use, disturb the soil and pave or repair it, making no material change in its condition, nor interfering with the estates of others in the way. *Brown* v. *Stone*, 10 Gray, 61.

The fact that a fenced way has been in constant use for the purposes of a way by the purchaser of the right thereof, though the writing has not been recorded, constitutes valid notice to a subsequent purchaser, and is good ground for a perpetual injunction upon its obstruction. *McCann* v. *Day*, 57 Ill. 101.

The proprietors of town lots, bounded on a dedicated street, have a private right in the street distinct from the claim of the public, which even the legislature cannot take away, unless to appropriate to a public use, and with compensation, and for an obstruction or injury of which such proprietor may have an action. *Common Council of Indianapolis* v. *Croas*, 7 Ind. 9.

§ 10. **Lost or extinguished by acts of land-owner.** A single instance of attempted interruption of an adverse user of a private way resulting in no actual interruption, and followed by no attempt to test the right, does not destroy the presumption of a grant founded upon the user. All the cases agree that the existence of the supposed lost grant on which the way is claimed is a question for the jury. The jury are warranted in finding the issue in favor of the right of way if the user has been for fifteen years continuous and adverse and uninterrupted, and are on the other hand, warranted in finding against the right of way if the user has not been peaceful and acquiesced in. The most that the owner of land can claim for such an isolated instance of attempted interruption of the user, resulting in no actual interruption, and followed by no attempt to test the right, is that it should be submitted to the jury with all the circumstances connected with it, to have its natural and proper weight according to those circumstances upon the main question, to wit, whether the user fairly indicates the existence of a lost grant. *Connor* v. *Sullivan*, 40 Conn. 26; 16 Am. Rep. 10.

Although bars have been kept up in the place of swinging gates, across a private or by-road for thirty or forty years by the owner of the land through which the road passes, without complaint on the part of those using the road, no presumption will be thereby created that the right of use of the road has ceased. *Van Blarcom* v. *Frike*, 5 Dutch. (N. J.) 516.

§ 11. **Lost by merger.** A right of way over a private street or lane,

existing in favor of the several lots fronting thereon, is, when all such lots are subsequently acquired by one person, thereby extinguished by merger. *Mott* v. *Mott*, 8 Hun (N. Y.), 474. But an easement both apparent and continuous is not extinguished by merger in consequence of the unity of possession in two joint owners who had purchased subject to it and had maintained its use. *McCarty* v. *Kitchenman*, 47 Penn. St. 239. And if the owner of the servient tenement purchase the dominant tenement as trustee, for the use of the wife of the owner of the dominant tenement, for life, with remainder to her children, the right of way is not extinguished nor even suspended. But if the owner of the servient tenement, over which a right of way exists, acquires the fee-simple title to the dominant tenement, the right of way is extinguished. *Pearce* v. *McClenaghan*, 5 Rich. (S. C.) 178.

A right of way appurtenant to land, over and upon adjoining lands, is not extinguished by the vesting of both estates in the same person as mortgagee, under separate mortgages, until both mortgages are foreclosed. *Ritger* v. *Parker*, 8 Cush. 145. And where a road existed from the plaintiff's land over the land of the defendant, to the public road, more than twenty years before, the fact that there was a unity of possession in the grandfather of the plaintiff and the defendant, of the lands owned by them within twenty years, does not necessarily destroy the right of way which previously existed, or show that it was lost by non-user or merger. The right of way might have been one of necessity. *Du Val* v. *Du Val*, 21 Md. 149.

§ 12. **Lost by abandonment.** Where a private way has been used for a long period by the owner thereof, but has become unnecessary to him as a way, and he has obstructed it, and used it for purposes inconsistent with the use of it as a way, the easement is thereby abandoned or relinquished, though it has not been so obstructed and used for a period of twenty years. *Crain* v. *Fox*, 16 Barb. 184. But it would not be extinguished by its owner's habitual use of another, equally convenient way instead thereof, unless there is an intentional abandon ment thereof (*Jamaica Pond, etc., Corp.* v. *Chandler*, 121 Mass. 3. See *Bombaugh* v. *Miller*, 82 Penn. St. 203), even though a close board fence had been maintained across it for seven years. *Hayford* v. *Spokesfield*, 100 Mass. 491. Proof of mere non-user of a way created by deed, for a period less than twenty years, without proof of adverse enjoyment by the owner of the land, is not sufficient proof of an abandonment of the right. *Bannon* v. *Angier*, 2 Allen, 128. And a parol agreement for the substitution of a new way for an old prescriptive way, and a consequent discontinuance to use the old way, afford no

evidence of an abandonment thereof. *Lovell* v. *Smith*, 3 C. B. (N. S.) 120.

Where an abandonment is claimed, the acts must in all cases be judged by the intention indicated by them, and nothing short of an intention to abandon the right will operate to extinguish it, unless other persons have been led by such acts to treat the servient estate as if free of the servitude. *White's Bank of Buffalo* v. *Nichols*, 64 N. Y. (19 Sick.) 65, 74. Where there has been no change in the title, and parties have not been led to change their position or condition in consequence of the acts of the owner of the easement, and the latter can resume the easement without injury to the rights of any one, he may do so, although he may temporarily cease to use the same, or his acts may be inconsistent with the existence of the easement. Id. See *Pope* v. *O'Hara*, 48 N. Y. (3 Sick.) 446, 455.

Where the owner of lands, across which others have a prescriptive right of way, for his own convenience closes such way, and opens another across other parts of his lands for the use of those having the right, and they assent to the change, and use the new way for a period less than twenty years; the owner cannot close such new way and prevent its use, without first restoring the old one to its former condition. *Hamilton* v. *White*, 1 Seld. 9; 4 Barb. 60.

§ 13. **Action for injuries.** Trespass lies for an injury to the soil of a way, though the same act constituted an obstruction of the easement. *Wilson* v. *Wilson*, 2 Vt. 68. And trespass to try titles will lie for the owner of the soil of a road over which the defendant has a right of way, but the sheriff can only give possession subject to the easement or servitude. *Jerman* v. *Matthews*, 2 Bailey (S. C.), 271. Under a plea of right of way, in an action of trespass *quare clausum fregit*, the defendant is at liberty to prove a right of way in himself, either by producing deeds to show it, or by parol evidence of twenty years, uninterrupted use, adverse or in hostility to the owner of the land from which a grant may be inferred, and he may, after having undertaken to prove an express grant or reservation of a way by deed, prove one by prescription. *Hamilton* v. *White*, 4 Barb. 60; 1 Seld. 10. An action may be maintained for any building over, or obstruction of a right of way, which renders the way low or dark or otherwise less convenient or useful to any appreciable extent for practicable purposes. *Richardson* v. *Pond*, 15 Gray, 387.

In an action for obstructing a private way, where it appeared that a part of the alleged private road, as once traveled, had not been lately used, although the place where the obstruction was located had been continually made use of by the plaintiff down to the time of placing

the obstruction, it was held that the plaintiff's ceasing to use the road through a swamp, which was the part as to which the use had been discontinued, would not prevent his recovering. *Crounse* v. *Wemple*, 29 N. Y. (2 Tiff.) 540.

One who lays out a street through his land, and then grants all the lots bounding on the street except one, may maintain an action of tort in the nature of trover, against either of the grantees, for taking earth from the street not necessary to the construction or repair of the street. *Phillips* v. *Bowers*, 7 Gray, 21. For an appropriation of the soil of a highway, trespass lies by the owner of the land through which the road passes. *Gidney* v. *Earl*, 12 Wend. 98. An action lies against a gas company for laying its pipes in a country highway without the consent of, or without the appraisal and payment of compensation to the owner of the land. *Bloomfield, etc., Gas-light Co.* v. *Calkins*, 62 N. Y. (17 Sick.) 366; 1 N. Y. Sup. Ct. (T. & C.) 549.

The plaintiff in an action for the obstruction of a way will not be limited to the recovery of merely nominal damages. *Smiles* v. *Hastings*, 24 Barb. 44.

It has been held that an action on the case may be maintained to recover damages for obstructing a way which the plaintiff had across the land of a third person, although certain logs which caused the obstruction were in fact placed by the defendant just over the line upon the plaintiff's land, at the point where the way entered it. *Carleton* v. *Cate*, 56 N. H. 130.

# CHAPTER CXXXIII.

## WHARVES AND WHARFINGERS.

### ARTICLE I.

#### OF WHARVES IN GENERAL.

**Section 1. Definition and nature.** A wharf is a structure usually made of timber or of stone and earth, raised on the shore of a harbor, river, canal or other navigable water, or extending some distance out from the shore with a perpendicular front toward the water, for the convenience of lading and unlading ships and other vessels. A wharf or landing place projecting far into the water is usually termed a "pier," and the terms "quay" and "landing place" are frequently employed to designate any place or bank, natural or artificial at the side of a harbor or other navigable water, used for landing goods or passengers.

Wharf accommodation is a necessity of navigation, and such accommodations are indispensable for ships and vessels and water-craft of every name and description, whether employed in carrying freight or passengers, or engaged in the fisheries. *Ex parte Easton*, 95 U. S. (5 Otto) 68. And such accommodations are needed both at the port of departure and at the place of destination. Id.

A wharfinger is one who owns or keeps a wharf or has the oversight or management of it, and the care and custody of goods deposited on it.

In their nature, wharves, piers, quays and landing places may be either public or private. Whether they are to be deemed of the one or the other class depends, not upon their ownership, because they may be public while the title is in an individual, but upon the purposes for which they were built, the uses to which they have been applied, the place where located, and the character of the structure. *Dutton* v. *Strong*, 1 Black (U. S.), 23. If private, no one can use them without the owner's consent, express or implied; but, if public, any person has a right to use them, upon complying with the regulations, and paying the compensation, prescribed by the public authorities.

The owner of a private wharf may keep it entirely private, or he may open it to the public. If he does the latter, he thereby confers a general license, similar to that conferred by the opening of an inn, upon all boats and vessels to use it for lawful purposes, on payment of compensation, and such license can only be terminated by notice and a request to remove. Dill. on Mun. Corp., §§ 68, 69.

Such a use by the public, being permissive, has no tendency to establish a dedication. *O'Neill* v. *Annett*, 3 Dutch. (N. J.) 290.

§ 2. **Erection and ownership.** The right to erect wharves is founded either on ownership of the soil where they are erected, or on the right of eminent domain. *Jeffersonville* v. *Louisville, etc., Ferry Co.*, 27 Ind. 100. At common law, the fee of the soil in tide waters, between high and low-water mark, was held to be in the crown, and in some of the American States, a paramount right in the public up to high-water mark on the shores of navigable rivers, above the ebb and flow of the tide, has been asserted by the courts.

But upon the question of the extent of the title of riparian proprietors, different courts have arrived at widely different conclusions. To inquire how far those conclusions are based upon local statutes or usages, or how they may be reconciled, would be foreign to the purpose of this chapter. It is sufficient here to say that nearly all the courts recognize an inherent and exclusive right in the riparian proprietor to wharf front from his own land to navigable water, provided he does not thereby impede navigation. *East Haven* v. *Hemingway*, 7 Conn. 186; *Simons* v. *French*, 25 id. 346; *Geiger* v. *Filor*, 8 Fla. 325; *Bell* v. *Gough*, 3 Zabr. 624, 658; *Stevens* v. *Patterson, etc., R. R. Co.*, 34 N. J. Law, 532; S. C., 3 Am. Rep. 269; *Thornton* v. *Grant*, 10 R. I. 477; 14 Am. Rep. 701; *Rice* v. *Ruddiman*, 10 Mich. 125; *Yates* v. *Milwaukee*, 10 Wall. (U. S.) 497; *Sherlock* v. *Bainbridge*, 41 Ind. 35; 13 Am. Rep. 302; *Grant* v. *City of Davenport*, 18 Iowa, 179; *Ensminger* v. *People*, 47 Ill. 384; *Chicago* v. *Laflin*, 49 id. 172. But see *Dana* v. *Jackson St., etc., Co.*, 31 Cal. 118.

This right may generally, therefore, be exercised by riparian proprietors on ocean, lake or navigable river, by virtue of their proprietorship and without special legislative authority; care being taken to conform to the regulations of the State for the protection of the public, and to avoid obstructing the paramount right of navigation. Dill. on Mun. Corp., § 70. If a wharf impairs the public right of navigation, it is a nuisance and subject to the rules which apply to other nuisances. See *Thornton* v. *Grant*, 10 R. I. 477; S. C., 14 Am. Rep. 701.

Although the riparian owner has this right to erect private wharves, and may allow them to be used by the public for a compensation to be

paid to him, yet the right to erect public wharves and to demand tolls or fixed rates of wharfage is held to be a franchise, requiring a legislative grant. *People* v. *Wharf Co.*, 31 Cal. 34; *The Wharf Case*, 3 Bland's Ch. (Md.) 383; *Wiswall* v. *Hall*, 3 Paige's Ch. 313; *Thompson* v. *Mayor, etc.*, 11 N. Y. (1 Kern.) 115.

A wharf erected by an individual, of his own motion, is private property. If built by the riparian proprietor on a navigable river, under an authority conferred by the legislature for that purpose, he has an exclusive and absolute right to the possession and use of it, and if there is no public highway leading to or from it, neither the public nor any individual has a right to cross such owner's land to reach it, without his consent. *Wetmore* v. *Atlantic White Lead Co.*, 37 Barb. 70. See *Wetmore* v. *Brooklyn Gas-light Co.*, 42 N. Y. (3 Hand) 384.

A municipality, which is itself the owner of the soil on the shore of navigable waters within its limits, has, doubtless, the implied authority to erect wharves thereon, unless restricted by its charter, and the incidental right to charge compensation for their use the same as any other proprietor. *Murphy* v. *Montgomery City*, 11 Ala. 586; *Commonwealth* v. *Roxbury*, 9 Gray, 514, n. Such a corporation may even erect wharves on lands along a navigable river within its limits which were dedicated as commons. *Newport* v. *Taylor*, 16 B. Monr. 699. Under an authority by law to extend its streets to the channel of a river, a city has the right to erect wharves in front of, or at the terminus of such streets. *Galveston* v. *Menard*, 23 Tex. 349.

A municipal corporation may also be authorized by law to establish a public wharf upon the land of a private owner, on making compensation to him, and it may exercise a power so conferred, notwithstanding the offer of the land-owner to erect the wharf at his own expense. *Waddingham* v. *St. Louis*, 14 Mo. 190.

The city of New York holds the title to the soil under its navigable waters to a certain distance from shore, and exercises the right to build wharves and piers thereon; and such wharves and piers are held to be streets for the free passage of all citizens. *Taylor* v. *Atlantic Mut. Ins. Co.*, 37 N. Y. (10 Tiff.) 275.

§ 3. **Regulating their use.** The right of riparian proprietors in respect to the erection and enjoyment of wharves, like other private rights, is subject to such reasonable limitations and restraints as the sovereign power of the community may deem it necessary and expedient to impose, having in view the public good. Statutes establishing harbor and dock lines and taking away the right of proprietors to erect wharves on their own land beyond those lines, even when such

wharves would be no actual injury to navigation, have been sustained on that ground. *Commonwealth* v. *Alger*, 7 Cush. 53. This power to establish and regulate wharves is classed among police powers, which may lawfully be delegated to municipal corporations created by legislative authority. *Baltimore* v. *White*, 2 Gill (Md.), 444; *Iron R. R. Co.* v. *Ironton*, 19 Ohio St. 299; *State* v. *Jersey City*, 34 N. J. Law, 390. But such a corporation can exercise no power in that respect, except such as has been conferred by the legislature. Ib.

A wharf, built by a city, under a general or a special law, is subject to the jurisdiction and control of the city authorities. *Jeffersonville* v. *Louisville, etc., Ferry Co.*, 27 Ind. 100.

In regard to private wharves lawfully erected, the power to regulate must be express, and it must be strictly construed. Thus, under an authority to a city "to regulate the erection and repair of private wharves and the rates of wharfage thereat," it may regulate, but must not destroy; may exercise control, as over other private property, but not to the extent of appropriating the use and enjoyment thereof without compensation. *Grant* v. *Davenport*, 18 Iowa, 179. An express delegation of authority to a city "to establish and keep in repair wharves, docks, landings, etc., regulate the use of wharves and public landings, fix the rate of wharfage, and regulate the stationary anchorage of all boats, etc., within the city," has been held to be necessarily exclusive, and to extend to the prohibition of the landing of boats, etc., at any other place than those prescribed by the city authorities, without their permission, and the payment of wharfage. *City of Dubuque* v. *Stout*, 32 Iowa, 80; S. C., 7 Am. Rep. 171. And a power to refuse assent to riparian owners to erect wharves, or to allow it on such terms as they deem beneficial to navigation and the use of the port of the city, has been held to authorize the city in granting the right to erect a wharf, to impose the condition that its exterior margin shall be a public wharf. *Baltimore* v. *White*, 2 Gill (Md.), 444. But a power "to regulate the erection of all wharves or levees within the corporate limits," will not authorize a city to so control the river bank as to require a riparian proprietor or his lessee to take out a license for his wharf-boat, fastened to the shore of his own land and used by him for business purposes. *McLaughlin* v. *Stevens*, 18 Ohio, 94. Nor can a city, under a charter power to establish dock and wharf lines, and to restrain and prevent encroachments upon the river and obstructions thereto, pass an ordinance declaring a private wharf to be an obstruction to navigation, and a nuisance, and ordering it to be summarily abated. The question of nuisance is one which must be judicially determined. *Yates* v. *Milwaukee*, 10 Wall. 497.

§ 4. **Right to wharfage.** Wharfage is defined to be money paid for landing wares at a wharf or landing place, or for shipping or taking goods into a boat or barge from thence. More properly, perhaps, it is the charge for the use of the wharf for those purposes, and for the care and attention of the wharfinger in respect to the goods.

The right to erect and maintain a wharf involves the right to charge a reasonable sum for the use of it and for the care bestowed upon the goods landed or transferred there. A private owner of a wharf may therefore rightfully charge wharfage to, and collect it from, others who use his wharf with his consent. *Ensminger* v. *People*, 47 Ill. 384; *Chicago* v. *Laflin*, 49 id. 172; *The Kate Tremaine*, 5 Ben. 60. And a municipal corporation may likewise collect compensation for the use of a wharf erected and controlled by it, whether so erected in its capacity as riparian proprietor, or by virtue of authority conferred upon it as such corporation. *Murphy* v. *Montgomery City*, 11 Ala. 586; *City of Dubuque* v. *Stout*, 32 Iowa, 80; 7 Am. Rep. 171; *Prescott* v. *Borough of Duquesne*, 48 Penn. St. 118.

The right to collect wharfage has usually been confined to those who have built wharves, improved the shore, or made some preparation for the reception or delivery of goods, or the accommodation of vessels (*Columbus* v. *Gray*, 2 Bush [Ky.], 476); but in California it has been held that an authority to a city "to erect, repair and regulate wharves and the rates of wharfage," authorized it to collect wharfage upon goods landed on the bank or space in front of the city which was dedicated to the public, though no artificial wharf had been erected there. *Sacramento* v. *Steamer New World*, 4 Cal. 41.

If a riparian proprietor permits municipal authorities to improve his shores by wharves, he cannot claim the tolls or wharfage, but will only be entitled to a reasonable compensation from those authorities. *Columbus* v. *Gray*, 2 Bush (Ky.), 476.

In respect to private wharves, the only rule governing the amount which may be charged appears to be the general one, applicable to other like bailments, that in the absence of express contract, only a reasonable compensation can be recovered. *Ex parte Easton*, 95 U. S. (5 Otto) 68, 73. In some cases already cited, the power to regulate the rates of wharfage at private wharves has been conferred by law upon, and has been exercised by the municipalities within which they were located.

As to public wharves and those erected by authority of some express statute, the legislature has power to fix the rates; and it may do so directly, or it may delegate that power to the local authorities, or to the individual builders and owners.

A lease of a public wharf does not change its public character, but all vessels resorting to it, including those of the lessee, are still subject to the general rules of law regulating the use of wharves and slips, and the lessee is merely entitled to the wharfage accruing thereat. *Commissioners of Pilots* v. *Clark*, 33 N. Y. (6 Tiff.) 251.

§ 5. **Interest in the goods deposited.** A wharfinger, in receiving goods upon his wharf, does so as a bailee, under an express or implied agreement to exercise a certain degree of care over them, and to deliver them to the bailor, or to such person as he may direct.

As an incident to this agreement, he is entitled to the possession of the goods until a delivery thereof is demanded, and due compensation is made, and this gives him a special interest in the property, which the law will protect. Such interest is an insurable one, and the wharfinger may insure it without any previous authority from or notice to the owner; and in case of loss, he can recover the full amount of the insurance, but he will be liable over to the owner for any excess above his charges. *Waters* v. *Monarch F. & L. Ins. Co.*, 5 El. & Bl. 870; 2 Jur. (N. S.) 375; 25 L. J. Q. B. 102.

§ 6. **Action for wharfage.** The right to wharfage is a legal right, to enforce which an action will lie as for a money demand. *Kelsey* v. *Murray*, 28 How. (N. Y.) 243; S. C., 18 Abb. Pr. 294. The proper parties to such an action are of course the persons directly interested in the matter in controversy, and no one not originally made a party can come in except on the motion or request of the plaintiffs or defendants.

It is no defense to such an action, by a municipality, that the wharf is not well built, or needs further improvements, but the remedy for those defects is by *mandamus* to compel the municipality to supply them, or by injunction to restrain the collection of wharfage. *Prescott* v. *Borough of Duquesne*, 48 Penn. St. 118.

In addition to this action for wharfage, the common law gave the owner of a wharf, opened to the public, as a compensation for his obligation to repair, the right to distrain for such wharfage (Dill. on Mun. Corp., § 69); and other special remedies are sometimes provided by statute to enable a wharfinger to enforce his lien on the goods or vessel, and these are sometimes made exclusive, so that wharfage can be collected in no other way. *Warren* v. *McDiarmid*, 34 How. (N. Y.) 304; *Mangum* v. *Farrington*, 1 Daly (N. Y.), 236.

The right, as between individuals and a municipal corporation, to moneys collected for wharfage, may also be tried in an action as for money had and received. *Murphy* v. *City Council*, 11 Ala. 586.

§ 7. **Lien for wharfage.** A wharfinger has a specific lien upon

goods deposited on his wharf for money due for the wharfage of those goods, and also a general lien for his balance of accounts against the owner. 2 Kent's Com. 642; *Naylor* v. *Mangles*, 1 Esp. (N. P.) 109; *Spears* v. *Hartley*, 3 id. 81. He has also a lien upon the vessel from which he receives the goods. *Johnson* v. *The McDonough*, Gilp. 101.

A wharfinger has no general lien in respect of laborage and warehouse room, except by agreement express or implied, but a general continued and undisputed usage is evidence of an agreement. *Holderness* v. *Collinson*, 1 M. & R. 55; 7 B. & C. 212. Nor can a wharfinger claim a lien on goods of one owner, the identity of which was not lost, for the salvage on goods of other owners stored with them, the identity of which was lost in a fire from which the whole were saved. *Grant* v. *Humphrey*, 3 F. & F. 162.

This lien upon goods will prevail over legal process against the owner of the goods, if it attached prior to the *teste* of such process. *Rex* v. *Humphrey*, McClel. & Y. 173. In case the owner of goods deposited on a wharf sells them, he can relieve himself from liability for subsequent charges thereon by giving notice to the wharfinger and paying or tendering all charges for wharfage up to the time of the sale. *Barry* v. *Longmore*, 12 Ad. & E. 639; 6 P. & D. 344; *Wooster* v. *Blossom*, 5 Jones' L. (N. C.) 244.

Where there is a general custom that the charges shall be paid at Christmas following importation, and the goods are sold before Christmas, the wharfage being still unpaid, the lien is lost, although the importer has become bankrupt. *Crawshay* v. *Homfray*, 4 B. & A. 50.

A wharfinger's lien for wharfage upon a foreign vessel is entitled to priority over a bottomry lien, unless he has made an express personal contract with the ship-owner. *Ex parte Lewis*, 2 Gall. (C. C.) 483; *Johnson* v. *The McDonough*, Gilp. (C. C.) 101. Such a lien upon a vessel is lost by its departure from its moorings, but it is revived if the ship is brought back without fraud or force. Id.; *Russell* v. *The Swift*, 1 Newb. (C. C.) 553. If a vessel is under arrest on legal process at the time the wharfinger's lien attaches, he cannot detain it to enforce his lien, but must apply to the court for its allowance. *The Phebe*, Ware, 354.

In a well-considered case in the supreme court of the United States, it was held that a contract for the use of a wharf by the master or owner of a ship or vessel, is a maritime contract and, as such, that it is cognizable in the admiralty; that such a contract, being one made exclusively for the benefit of the ship or vessel, a maritime lien in the case supposed arises in favor of the proprietor of the wharf against the vessel for payment of reasonable and customary charges in that behalf

for the use of the wharf, and that the same may be enforced by a proceeding *in rem* against the vessel, or by a suit *in personam* against the owner. *Ex party Easton*, 95 U. S. (5 Otto) 68.

§ 8. **Actions for obstructions to wharf.** The owner of a wharf on navigable waters is entitled to free access thereto, without unnecessary obstruction by the acts of others. A raftsman upon a navigable river, although entitled to use it for the passage of his rafts or other water craft, must do so with due regard to the rights of others, and has, therefore, no right to so moor his rafts as to seriously interfere with the right of the riparian owner to bring his own vessels navigating the river to his own wharf. The latter, in case of such obstruction by a raft moored in the river and left in charge of no one, may lawfully untie it, doing no unnecessary damage and let it float away. *Harrington* v. *Edwards*, 17 Wis. 586. If a pier projecting near a wharf is used in such a manner as to prevent the owner of the latter from using it, that may be an obstruction for which an action will lie to recover damages, though it will not entitle the wharfinger to wharfage. *Camden & Amb. R. R.* v. *Finch*, 5 Sandf. 48. But one who is navigating a river has the right to land at such wharf as suits his convenience, and if, in so doing, the stern of his boat is carried down stream by the current, or by other circumstances, so that it projects in front of and obstructs the approach to an adjoining wharf, he is not liable for any consequential damages sustained by the owner of such wharf, provided he uses due care, skill and dispatch, and subjects the latter to as little inconvenience as is possible consistently with the exercise of his own rights. *Sherlock* v. *Bainbridge*, 41 Ind. 35; S. C., 13 Am. Rep. 302.

A private action can be maintained by the owner of a wharf for a public nuisance obstructing the approach to or use of his wharf, as by filling up the river or the like, only when the plaintiff receives special and peculiar damage therefrom. *Dougherty* v. *Bunting*, 1 Sandf. 1; *Baron* v. *Baltimore*, 2 Am. Jur. 203; *Stetson* v. *Faxon*, 19 Pick. 147; *Thayer* v. *Boston*, id. 510; *Prest., etc., of Harvard Col.* v. *Stearns*, 15 Gray, 1.

Neither the owner of a vessel which without his fault is burned and sunk near the mouth of a slip, so as to prevent other vessels coming in, nor an insurance company, which had insured an interest in the vessel and has accepted an abandonment, is liable in an action for a loss of wharfage caused thereby (*Taylor* v. *Atlantic M. Ins. Co.*, 2 Bosw. [N. Y.] 106; 9 id. 369; 37 N. Y. [10 Tiff.] 275), especially where the owner makes all reasonable efforts to remove the sunken vessel. Id. See Vol. 4, tit. *Nuisance*.

§ 9. **Duty to keep in repair.** The common law imposed upon the owner of a private wharf, who opens it to the public, the duty as to the public of keeping it in good repair; and as a compensation therefor, allowed him to distrain for his wharfage. Keeping a pier open for the purposes of loading and unloading vessels gives a general license to all persons to go upon and use it for those purposes, and the owner or occupant is bound to keep it in a safe condition, so that those having lawful right can go upon it without incurring risk of injury. *Swords* v. *Edgar*, 59 N. Y. 28; S. C., 17 Am. Rep. 295. The party liable to keep it in repair will be liable to any one who receives injury through defects in the structure, unless they were so hidden that they could not be discovered by reasonable inspection, or were previously known to the person injured. Id.; *Clancy* v. *Byrne*, 58 Barb. 449; *Wendall* v. *Baxter*, 12 Gray, 494. A municipal corporation which exercises control over a public wharf, and receives tolls for its use, owes a duty to the public to keep it in a proper and secure condition, and is liable, without any statutory enactment to that effect, to an action for any special injuries to vessels caused by its failure to discharge that duty; and this is so whether it has or has not adopted or enforced ordinances for the regulation of such wharf. *Pittsburg* v. *Grier*, 22 Penn. St. 54; *Eastman* v. *Meredith*, 36 N. H. 284; *Jeffersonville* v. *Louisville, etc., Ferry Co.*, 27 Ind. 100; *Buckbee* v. *Brown*, 21 Wend. 110. So, it is liable for the loss of a horse and cart when caused by the defective condition of the wharf. *Macauley* v. *Mayor, etc., of N. Y.*, 67 N. Y. (22 Sick.) 602. And a lessee of such corporation is under a like liability. *Radway* v. *Briggs* 37 N. Y. (10 Tiff.) 256.

Proper fastenings must be provided to protect vessels from being swept away, otherwise the wharf-owner will be liable for damages caused by their absence. *Shinkle* v. *Covington*, 1 Bush (Ky.), 617. If goods are lost by reason of the want of a suitable guard to a pier, the owner or lessee is liable for their value. *Radway* v. *Briggs*, 37 N. Y. (10 Tiff.) 256.

A public wharf must also be kept unobstructed and in a proper condition for the free use of those entitled to use it, and a lessee thereof cannot lawfully place structures upon it for his own convenience which will materially incumber it or interfere with such use. *Commissioners of Pilots* v. *Clark*, 33 N. Y. (6 Tiff.) 251.

The owner of a wharf is not absolutely bound to maintain a depth at such wharf sufficient for all vessels at all times, but it is his duty to give information as to the inequalities in the depth of water, when that is material to the safety of a vessel about to moor there. *Nelson* v. *Phœnix Chem. Works*, 7 Ben. 37.

§ 10. **Duty as to goods.** Wharfingers are bailees of the goods deposited on their wharves. The contract, implied if not expressed upon such a deposit, is one of mutual benefit, and the wharfinger is, therefore, only bound to exercise reasonable and ordinary care in respect to them, and is liable only for losses occasioned by a want of such care. *Cox* v. *O'Riley*, 4 Ind. 368; *Foote* v. *Storrs*, 2 Barb. 326; *Blin* v. *Mayo*, 10 Vt. 56. In an action for such a loss it *seems* the burden of proof is on the plaintiff to show negligence. Ib.

In order to render the wharfinger liable for goods in any event, there must be an actual delivery to him or his agent. A delivery on his wharf is not necessarily a delivery to him. Id.; *Buckman* v. *Levi*, 3 Camp. 414. His responsibity for the goods does not begin until he has either expressly or by implication received them. *Rodgers* v. *Stophel*, 32 Penn. St. 111; *Quiggin* v. *Duff*, 1 M. & W. 174; S. C., 1 Gale, 420. Vol. 2, pp. 23, 52.

Owners of a wharf, who have a storehouse adjoining and receive goods in store for a compensation, are held to be liable, not as wharfingers, but as warehousemen. *Platt* v. *Hibbard*, 7 Cow. 497. But the liability of the two classes of bailees, if not identical, is nearly so. It is the duty of the wharfinger to deliver the goods as he may be directed by his bailor. It they are to go away by vessel the wharfinger will not be discharged by a delivery to one of the crew of such vessel, but must deliver to the captain or some onehaving authority to receive them. *Leigh* v. *Smith*, 1 C. & P. 638; R. & M. 224. If by established usage they are to be delivered to the mate of the vessel on the wharf, such a delivery relieves the wharfinger from further responsibility. *Cobban* v. *Downe*, 5 Esp. 41.

If notified that the goods in his possession bear a spurious trademark, and that the sale will be enjoined, and he is requested not to deliver them, he will be justified in withholding delivery. *Hunt* v. *Maniere*, 34 Beav. 157; 13 W. R. 212; 11 L. T. (N. S.) 469.

As to goods which a wharfinger undertakes to convey from the wharf to a vessel by his own lighters, he assumes the greater liability of a common carrier. *Maving* v. *Todd*, 1 Stark. 72; S. C., 4 Camp. 225; See Vol. 4, tit. *Negligence*.

§ 11. **Actions by wharfingers.** The actions for wharfage and for damages arising from obstructions have already been spoken of. In addition to these, a wharfinger may maintain an action of trespass or trover for any unlawful interference with his possessory rights and interest in the property, the same as any other bailee. But he is also entitled to the benefit of equitable remedies for the prevention of injuries to his rights. Thus a court of equity will protect by injunc-

tion the owners of a private wharf, having an exclusive right of wharfage, from any interference with such right by a municipal corporation, as by its appropriating an adjoining slip to the purposes of a public ferry. *Murray* v. *Sharp*, 1 Bosw. (N. Y.) 539. It will also restrain encroachments upon the use of wharves and piers of private owners by stationary obstructions preventing ingress to and egress from their property or other occupation of the waters necessary to the proper enjoyment thereof by floating vessels (*Penniman* v. *N. Y. Balance Co.*, 13 How. [N. Y.] 40); or by the construction of another wharf in front of those already constructed, cutting them off from navigable waters. *Cowell* v. *Martin*, 43 Cal. 605.

§ 12. **Actions against wharfingers.** An action will lie against a wharfinger for any breach of his duty in respect to the goods deposited with him. If, after having assented to the title of a party demanding goods deposited to be shipped to his wharf, he refuses to deliver them to such person, trover will lie, and he will be estopped from denying the title. *Holl* v. *Griffen*, 3 M. & S. 732; S. C., 10 Bing. 246.

If a vessel lawfully making use of his wharf, and exercising proper care, is injured by the inequalities of the bottom alongside, the wharfinger is liable for the damage. *Sawyer* v. *Oakman*, 7 Blatchf. (C. C.) 290; *Carleton* v. *Franconia Iron Co.*, 99 Mass. 216.

The remedy against the proprietors of a franchise of wharfage in case of neglect to provide adequate facilities is by *mandamus* to compel them to provide such facilities, or by injunction to restrain them from collecting wharfage. *Prescott* v. *Borough of Duquesne*, 48 Penn. St. 118. But a mandatory injunction will not be granted to compel the owners of a private wharf to allow wharfage facilities to a particular person as well as to others where they have only exercised a legal discretion in excluding him on account of an excess of other business. *Audenreid* v. *Phil. & Read. R. R. Co.*, 68 Penn. St. 370; S. C., 8 Am. Rep. 195.

# CHAPTER CXXXIV.

## WILLS.

### ARTICLE I.

#### OF WILLS IN GENERAL.

**Section 1. Action to establish or construe.** A will is a disposition of property, real or personal, or both, made by the owner with intent that it shall take effect at his death. Being the basis of title to vast amounts of property, the mode in which wills shall be executed, authenticated and established, has very properly been made the subject of legislation by all civilized nations, and their interpretation and enforcement has occupied a large place in the business of the courts. Generally they are required to be in writing, signed and published by the testators in the presence of witnesses, who also sign them and are mainly relied upon to establish their authenticity, but in special cases, usually defined by statute, verbal or nuncupative wills made in the presence of witnesses are also held valid.

The general subject of wills embraces an immense field, which it would be impossible to traverse in this brief chapter, but there are certain actions in respect to wills which of late are becoming more common than they were formerly, a concise view of which is necessary to complete the plan announced in the preface of this work.

Jurisdiction to take the proof and establish the authenticity and validity of wills, and to construe their provisions, is usually conferred by law upon courts created for that special purpose, and known by the various names of ordinary, orphans', probate, or surrogate courts. To be recognized as evidence of title to property, a will must ordinarily be first proved in a court of that character, for the district in which the testator was domiciled at the time of his decease. See *Wild* v. *Sweeney*, 84 Ill. 213. The case of a will suppressed or destroyed by the executor or an interested party is an exception to this rule. 2 Redf. on Wills, 12.

The powers of these courts are entirely statutory, and are generally too limited to enable them to deal efficiently with all the questions which arise in respect to wills, and recourse must, therefore, be had to courts

of equity having a general jurisdiction. In some of the American States, however, as in Wisconsin, they have all the legal and equitable powers necessary to the due administration of estates, and can enforce trusts created by wills the same as courts of equity, the jurisdiction of the latter courts being merely concurrent. *Brook* v. *Chappell*, 34 Wis. 405; *Jackman Will Case*, 26 id. 104.

The proceeding to prove a will in an ordinary court of probate, though not an action in the strict sense of that term, yet so far partakes of the nature of one, especially when objections are interposed by any of the parties interested, that, to a great extent, the same rules and principles apply to it as to an action for the same purpose. The notice required by law to be given to the parties interested is not a compulsory process, and none but those who choose need appear; but those who do appear are at liberty to make and urge all legal objections to the will proposed to be proved, or to the construction thereof claimed by parties adversely interested, as fully as are defendants in an ordinary action; and usually they may have questions of fact submitted to a jury in that court, or in an appellate court of more extensive jurisdiction. A revocation by a subsequent will, duly made and published, is available to prevent the probate of the will claimed to be revoked by it, although such subsequent will cannot be found, or is not capable of being so clearly proved as to entitle it to be admitted to probate. *Moore* v. *Griswold*, 1 Redf. (N. Y.) 388; *Wallis* v. *Wallis*, 114 Mass. 510. And a will which has been lost, or fraudulently suppressed or destroyed, may, in England, and in some of the American States, be established in the probate court of the proper district. *Podmore* v. *Whatton*, 33 L. J. Prob. 143; 13 W. R. 106; *McBeth* v. *McBeth*, 11 Ala. 596; *Slade* v. *Street*, 27 Ga. 17. But a court of equity, where it has not exclusive, has at least concurrent jurisdiction of such cases. *Hayne* v. *Hayne*, 1 Dick. 18; *Tucker* v. *Phipps*, 3 Atk. 360; *Boyse* v. *Bosborough*, 6 H. of L. C. 3; *Brown* v. *Brown*, 10 Yerg. 84; *Mead* v. *Heirs of Langdon*, and *Heirs of Adams* v. *Adams*, 22 Vt. 50, 59; *Harris* v. *Tisereau*, 52 Ga. 153; S. C., 21 Am. Rep. 242. And even where express statutes exist, providing for suits of that character, it has been held that equity had jurisdiction in cases where fraud was alleged, independently of the statute. *Bowen* v. *Idley*, 6 Paige, 46; *Hall* v. *Gilbert*, 31 Wis. 691.

An action may, therefore, be maintained in equity to establish a will which is alleged to have been lost, suppressed or destroyed. But it is essential to jurisdiction of such an action, that the will should have been actually in existence at the time of the testator's death, or that the inability to produce it shall have arisen from accident or fraud. *Bulkley*

v. *Redmond*, 2 Bradf. (N. Y.) 281; *Buchanan* v. *Matlock*, 8 Humph. 390. If it was destroyed in the life-time of the testator, and with his knowledge or assent, there must be proof that he was at the time incompetent to consent, or that his consent was procured by fraud. *Body, in Goods of*, 4 S. & T. 9; 34 L. J. Prob. 55; *Allison* v. *Allison*, 7 Dana, 90. The mere fact that it was not destroyed in the presence of two witnesses, as required by statute, to make it operate as a revocation, cannot be deemed such a fraud as to entitle the destroyed will to be established in equity. The fraud must consist in some deceitful contrivance, device, or practice, to defeat the wishes and intent of the testator, in regard to his will; and the question of fraudulent intent is one of fact. *Timon* v. *Claffy*, 45 Barb. 438; 41 N. Y. (2 Hand) 619.

Where a will is alleged to have been duly executed and deposited with a person for safe-keeping, and that such person has never presented it for probate, or even for inspection, but has himself been appointed administrator of the estate, and as such has paid over the assets to his wife, the sole heir of the testator, a suit may be maintained by legatees to have such will proved and confirmed, and to compel an accounting and payment of their legacies by such heir. *Hall* v. *Gilbert*, 31 Wis. 691.

Any person who derives title under a will may maintain an action against the heir of the testator, or other person who has fraudulently destroyed the will in order to defeat his title, to have the same established. Such an action may be maintained by a residuary devisee of an estate, even against the executor of the legal heir of such estate, where such heir has destroyed the will, under which she was entitled to a mere life estate, in order to secure the full title to herself. *Harris* v. *Tisereau*, 52 Ga. 153; S. C., 21 Am. Rep. 242. In England it is held that a mere legal devisee, not charged with any trust or duty under a will, may maintain a bill against the heir at law to establish such will. *Colclough* v. *Boyse*, 6 H. L. C. 1; 3 Jur. (N. S.) 373; 26 L. J. Ch. 256.

It has been held in some cases that equity has no jurisdiction of an action to establish a will, until it has first been set up in the proper probate court. *Ryves* v. *Wellington*, 9 Beav. 579; 15 L. J. Ch. 461. The ecclesiastical courts of England, which are probate courts, have no jurisdiction to determine the validity of a will of real estate; but after a will has been contested in those courts, and established there as to personalty, an action in equity may be brought by the devisee of the realty, against the person who so contested it, to establish the will as to realty. *Lovett* v. *Lovett*, 1 F. & F. 581; 2 Jur. (N. S.) 1130.

In Ohio the contestants of a will may proceed either according to the forms of chancery, or by petition under the Code. In either proceeding, issue must be joined in some form as to whether the will sought to be proved is the last will of the testator or not, the affirmative of such issue being with the proponent. *Brown* v. *Griffiths*, 11 Ohio St. 329.

The jurisdiction to establish a lost or destroyed will necessarily draws to it power to set aside in the same action a subsequent invalid will, purporting to be a revocation of the first. *Bowen* v. *Idley*, 6 Paige, 46. But equity has no jurisdiction to set aside a will which has been admitted to probate, or the probate thereof, on the ground that the same was fraudulently obtained. *Archer* v. *Meadows*, 33 Wis. 166; *Parker* v. *Parker*, 11 Cush. 519; *Harris* v. *Tisereau*, 52 Ga. 153; S. C., 21 Am. Rep. 242.

A suit to establish a will is in the nature of an action *in rem*, and all persons interested for or against it should be made parties, as all will be bound by the judgment. *Patton* v. *Allison*, 7 Humph. 320; *Eddie* v. *Parke*, 31 Mo. 513.

The mode of establishing, in one country or State, a will disposing of property therein, but executed in another country or State, is ordinarily prescribed by statute. The filing of an authenticated copy of the will, and of the proceedings and decree of the proper court of the domicile of the testator admitting it to probate, in the proper probate office of the State where it is sought to be established is, in many of the American States, made sufficient to entitle it to admission as a valid will; but in New York there are statutory provisions for making proof before the court of chancery of foreign wills made by persons leaving property in that State.

As before stated, courts of probate jurisdiction are usually empowered to construe wills, whenever that is necessary to the due administration of the estate; and in some States their jurisdiction in that respect is co-extensive with that possessed by courts of equity, but in others it is more limited. *Brook* v. *Chappell*, 34 Wis. 405, 419; *E. Schaeffner's Appeal*, 41 id. 260. In Wisconsin, either the probate court or the circuit court on appeal may construe a will, in a contest between the executor and the residuary legatee respecting the rights of the latter. *Jackman Will Case*, 26 Wis. 104; *Tryon* v. *Farnsworth*, 30 id. 577; *Chandler's Appeal*, 34 id. 505.

The construction of wills, however, frequently presents embarrassing questions, which can best be expounded by a court of equity. The case of an ambiguous will is one peculiarly needing the aid of equity to construe it. The discovery and enforcement of trusts is one of the

most important heads of equity jurisdiction, and as these very frequently arise from the language of wills, or from the facts connected with their execution, a court of equity may properly assert its right to construe wills upon that ground, if no other. The jurisdiction is incidental to that over trusts. *Chipman* v. *Montgomery*, 4 Hun (N. Y.), 739; S. C. affirmed, 63 N. Y. (18 Sick.) 221.

Questions as to the construction of a will can only be raised after the will has been proved before a court of competent jurisdiction. *Ryves* v. *Wellington*, 9 Beav. 579; 15 L. J. Ch. 461; *Estate of Cobb*, 49 Cal. 600.

Any executor or administrator with the will annexed, holding property under a trust created by a will, may, in case doubts arise as to the true construction of such will, bring his bill in equity, setting forth the facts, and calling upon persons claiming adversely to each other to settle their rights before the court, and asking the court to construe the will and direct as to the mode of executing the trust. 1 Redf. on Wills, 492; *Schaeffer's Appeal*, 41 Wis. 260. Such a bill is sometimes termed a bill of interpleader, and is indeed of that nature, but differs from one in that the executor has an interest in the result. *Wheeler* v. *Hartshorn*, 40 Wis. 83. But a mere foreign administrator of one who derived estate under the will of her ancestor in the State where she was domiciled at the time of her death is not a proper party in a suit in that State to construe the will of such ancestor; certainly not for affirmative relief. *White* v. *Howard*, 52 Barb. 294.

Such a suit may also be maintained by any party claiming an interest under a will against the executor or administrator, and all other parties interested in the question. Thus, parties claiming an interest in land under a will may maintain an action for a construction of the will, and for partition and an accounting against others who are in possession claiming exclusive rights under the same will, and that without first trying the question of title in ejectment. *Scott* v. *Guernsey*, 60 Barb. 163. But if no estate in or control over the testator's land was given to the executors, they cannot join with the heir to obtain construction of a clause in the will giving a farm to one legatee on condition of his supporting the testator; nor can the heir obtain construction thereof in a suit in his own name, upon his mere allegation of the failure of such legatee to perform the condition without proof. *Brundage* v. *Brundage*, 65 Barb. 397. Nor can one who claims a mere legal estate in realty under a will where there is no trust come into equity to obtain a judicial construction of such will. *Bailey* v. *Briggs*, 56 N. Y. 407; 6 Lans. 356. Nor can heirs at law do so unless they are specially authorized by statute (*Meserole* v. *Meserole*, 1 Hun, 66), nor can

a devisee of real estate, claiming title by reason of the invalidity of the residuary devise, or a mere pecuniary legatee, sue for a judicial construction. *Chipman* v. *Montgomery*, 4 Hun (N. Y.), 739; S. C. affirmed, 63 N. Y. (18 Sick.) 221. A legatee cannot maintain an action for the sole purpose of obtaining a construction of a will. *Sutherland* v. *Ronald*, 11 Hun, 238. If a distributee can in any case do so, he can do it only when the executor has in his hands personal property in trust, either under the provisions of the will for the legatees or because of the invalidity of its provisions for the distributees under the statute; and that fact must be alleged and proved. Id. A court of equity will not attempt to construe a clause in a will, if some of the parties interested in its construction are not *in esse*, or are not before the court as parties, or if those interested and before the court do not ask it. *Parks* v. *Parks*, 9 Paige, 107. That a widow can maintain an action to obtain a construction of her husband's will, see *Keteltas* v. *Keteltas*, 53 How. (N. Y.) 65.

A brief statement of the general principles governing courts of equity in the construction of wills as derived from the numerous cases on that subject will not be out of place here. The object of the court always is to arrive at the probable intent of the testator, and for that purpose it is frequently necessary to depart more or less from the strict literal and grammatical import of the words. It is held that the words, with the exception of technical terms, must be given their ordinary popular signification unless there is something in the context or subject-matter to indicate a different use; and this indication must be clear and unequivocal in order to prevail. Technical words are *prima facie* to be given their technical meaning. Where the words can have a natural and also a secondary and unusual interpretation, the former will be preferred; and plain and distinct words will not be held controlled by other words, unless they are equally plain and distinct. A construction which gives a reasonable and natural direction to property is to be preferred to one which is capricious and uncertain, where the language admits of two constructions. This intent of the testator is to be gathered only from the words found in the instrument, and such as are necessarily supplied by the context. Where a contingency has happened not provided for by the testator, and it cannot be conjectured what he would have done if such a contingency had been present to his mind, the words to be construed are to be taken in their ordinary sense. General words following a specific enumeration are to be limited in their operation to matters *ejusdem generis*. Every portion of a will is to be upheld if possible, but in cases of irreconcilable repugnancy the latest portions of the will must stand. Words evidently

omitted may be supplied by intendment, or by reference to correlative parts of the will; and words may be transposed to make the meaning clear, but no word is to be rejected or changed except upon the clearest certainty. In ascertaining the intent of the testator, full effect is to be given to the particular as well as to the general intent, so far as it can be ascertained from the will and is consistent with law. See 1 Redf. on Wills, 437, etc.; Willard's Eq. 490, etc.; *Van Vechten* v. *Keator*, 63 N. Y. (18 Sick.) 52; *Aulick* v. *Wallace*, 12 Bush (Ky.), 531; *Hammett* v. *Hammett*, 43 Md. 307; *Courter* v. *Stagg*, 27 N. J. Eq. 305.

A court of equity will declare a trust whenever that appears to be the intention of the testator, though not contained in the will; whenever the words of the will imply a trust for relatives; whenever the will charges the estate with the payment of debts; whenever a notorious fraud upon a legatee appears; and whenever a legatee, who promised the testator that he would stand as trustee for another, refuses to do so. *Shaw* v. *Borrer*, 1 Keen. 559, 576; *Bailey* v. *Ekins*, 7 Ves. 319; *Ball* v. *Harris*, 4 Myl. & Cr. 267; 3 Jur. 140.

§ 2. **Of the evidence admissible.** In a proceeding to establish a will, whether in a probate court or a court of equity, the burden of proof is on the proponent to make a *prima facie* case. Substantially the same kind of evidence is admissible and is required for that purpose in either court.

A proceeding to establish a lost or destroyed will is, however, a case for secondary evidence exclusively, the best evidence being necessarily unattainable. *Everitt* v. *Everitt*, 41 Barb 385; reversed, 27 How. (N. Y.) 600. See *Rider* v. *Legg*, 51 Barb. 260. The facts of the due execution of the will and of the death of the testator must be proved substantially as in the case of an existing will, and in addition thereto, proof must be made of its existence at the death of the testator, of its subsequent loss, suppression or destruction, or of its fraudulent destruction prior to the testator's death, and also of its contents. *Grant* v. *Grant*, 1 Sandf. Ch. 235; *Clark* v. *Wright*, 3 Pick. 67. In ordinary cases, but little if any proof of the death of the testator is required beyond general notoriety and the statement of the fact continued in the application for probate; but when the testator is alleged to have died abroad, proof of his absence unheard of for seven years, or in some cases for a less time, or of reliable reputation of the fact and manner of his death, which has reached his friends and relatives in such form as to gain general credit, has been held sufficient.

The burden of proving the due execution of a will and the testamentary capacity of the testator falls, in the first instance, upon the person presenting the will for probate. The proof of due execution

ordinarily consists of proof that it was voluntarily signed by the testator with knowledge of its contents, or by some one in his presence and at his request, in the presence of the number of witnesses required by law, who also signed it as witnesses in presence of the testator and of each other, and was by the testator published or declared to them, in some form, to be his last will and testament. For making this proof, the testimony of the subscribing witnesses is mainly relied upon, and one or more of them must be produced, if practicable, at the hearing of the application; but if they reside abroad and their attendance cannot be procured, it is the practice of the English and of some of the American courts to issue a commission, with the original will attached, to take their testimony. *Forster* v. *Forster*, 10 Jur. (N. S.) 594. If the witnesses are dead, or have lost all recollection of the execution of the will, proof of handwriting is admissible. *Price* v. *Brown*, 1 Bradf. (N. Y.) 291; *Peebles* v. *Case*, 2 id. 226.

At common law the testimony of one of the subscribing witnesses, if credible, was sufficient to establish the due execution of a will, provided he testified that he saw the other witnesses subscribe it in the testator's presence. *Graham* v. *O'Fallon*, 3 Mo. 507; *Dan* v. *Brown*, 4 Cow. 483; *Jackson* v. *Betts*, 6 id. 377; *Dickey* v. *Malechi*, 6 Mo. 177. And that rule still prevails in the surrogate courts of New York, in case of a lost will, notwithstanding the provision of the Revised Statutes requiring two witnesses to that fact in a chancery proceeding for the same purpose. *Harris* v. *Harris*, 26 N. Y. 433; *Timon* v. *Claffy*, 45 Barb. 438; 41 N. Y. 619. The testimony of a single witness that a will was wholly written and signed by the testator is sufficient in Kentucky to set up such will, if its loss after his death and its contents are satisfactorily made out. *Baker* v. *Dobyns*, 4 Dana, 220. But, the rule prevails to a considerable extent, in suits in chancery, to prove lost or destroyed wills, that all the subscribing witnesses must be produced in the first instance, and every important requisite of the statute must be proved by each witness; but their absence may be accounted for as in other cases, so as to let in secondary proof. *James* v. *Parnell*, Turn. & Russ. 417; *Bomford* v. *Wilme*, 1 Beat. 252; *Concannon* v. *Cruise*, 2 Moll. 332; *Burwell* v. *Corbin*, 1 Rand. 131; *Kitchens* v. *Kitchens*, 39 Ga. 168.

Very strict proof of a compliance with all the requirements of the statute, in respect to the execution of the will, is usually insisted upon; and this rule applies with at least equal, if not with greater force, to a lost, as well as to an existing will. *Bailey* v. *Stiles*, 1 Green's Ch. 220; *Moore* v. *Whitehouse*, 3 S. & T. 567; 1 L. T. (N. S.) Prob. 458; *Kearns* v. *Kearns*, 4 Harr. 83.

As to the testamentary capacity of the testator, and the voluntary nature of the will, the presumption is in favor of both; and though the witnesses are usually questioned as to his sanity, the burden of showing the contrary is on the contestants of the will. *Jackson* v. *Van Dusen*, 5 Johns. 144; *White* v. *Wilson*, 13 Ves. 87; *Atty.-Gen.* v. *Parnther*, 3 Bro. (C. C.) 443; *Tucker* v. *Phipps*, 3 Atk. 361; *Werstler* v. *Custer*, 46 Penn. St. 502; *Runyan* v. *Price*, 15 Ohio St. 1. Proof that the testator had once been insane has, in some cases, been held to change the burden of proof. *Saxon* v. *Whitaker*, 30 Ala. 237; *Halley* v. *Webster*, 21 Me. 461; *Griffin* v. *Griffin*, R. M. Charlt. 217.

If a single unimpeachable witness testifies to the fact that the testator knew, at the time of its execution, the contents of his will, that is sufficient to sustain a finding in its favor. *Cox* v. *Cox*, 4 Sneed (Tenn.), 81.

The proof of the loss of a will, when addressed to the court, need not be as strict and technical as if addressed to a jury. *Fetherly* v. *Waggoner*, 11 Wend. 599. To establish its loss, there must be proof of a diligent and exhaustive but unsuccessful search for it where it would most probably be found, unless there is satisfactory proof of its actual destruction. *Eure* v. *Pittman*, 3 Hawks, 364. And though proved to have once existed, it will not be presumed to have continued in existence until the death of the testator; and if it cannot be found on diligent search, secondary evidence cannot be given of its contents. *Betts* v. *Jackson*, 6 Wend. 173. The loss or destruction of a will previous to the testator's death may be shown by parol testimony, if such will has not been revoked. *Tynan* v. *Paschal*, 27 Tex. 286. And if it has been lost or destroyed under circumstances which show that the testator did not know of or consent thereto, its legal existence at his death may be proved by circumstantial evidence, such as proof that it was placed in charge of a custodian and locked up by him in a trunk, where it was supposed to be when the testator died, but could not be found afterward. *Schultz* v. *Schultz*, 35 N. Y. (8 Tiff.) 653. Upon an issue to try the validity of a will, alleged to have been revoked by a subsequent will which has been destroyed, the declarations of the testator concerning it up to near the time of his death, are competent to show that it was not destroyed by his direction; and the declarations and acts of the person who did destroy it are competent upon the question by whom it was done. *Youndt* v. *Youndt*, 3 Grant (Penn.), 140.

In order to establish the contents of a lost will, the fullest and most stringent proof is generally required. *Wharram* v. *Wharram*, 3 S. & T. 301; 33 L. J. Prob. 75; 12 W. R. 889; 10 L. T. (N. S.) 163. This is especially so where the person who destroyed a will asks probate of

the substance thereof, on production of a copy or otherwise. *Moore* v. *Whitehouse*, 3 S. & T. 567; 11 L. T. (N. S.) 458. A copy or draft of the will alleged to be lost or destroyed is the best evidence of its contents, and is generally required to be produced (*Happy's Will*, 4 Bibb, 553; *Jackson* v. *Russell*, 4 Wend. 543; *Smith* v. *Steele*, 2 Harr. & J. 112); but if there be none, parol proof of its contents is admissible (*Barber, in Goods of*, 1 L. R., P. & D. 267; 36 L. J. Prob. 19; *Graham* v. *O'Fallon*, 3 Mo. 507); and any proof, which satisfies the conscience of the jury is sufficient to prove such contents and rebut the legal presumption of revocation. *Kitchens* v. *Kitchens*, 39 Ga. 168.

A devisee under a will, who is also the heir at law, is a competent witness to prove its contents, when against his interest. *Dickey* v. *Malachi*, 6 Mo. 177. But the admission of only part of the heirs or next of kin are not admissible to establish it, because they cannot bind the others. *Grant* v. *Grant*, 1 Sandf. Ch. 235. Properly, the contents of a lost or destroyed will, if to be proved by a witness, should be proved by one who has read it, or heard it read (*Morris* v. *Swaney*, 7 Heisk. [Tenn.] 591); but clear proof of its fraudulent destruction makes other evidence admissible. *Chisholm* v. *Ben*, 7 B. Monr. 408. Whatever the evidence be, it must be clear, satisfactory and convincing. *Wyckoff* v. *Wyckoff*, 1 Green (N. J.), 401; *Tynan* v. *Paschal*, 27 Tex. 286; *Matter of Johnson's Will*, 40 Conn. 587. Some cases hold, that the whole contents of the will must be so proved, before it can be admitted to probate (*Davis* v. *Sigourney*, 8 Metc. 487; *Durfee* v. *Durfee*, id. 490, *n.*); but others hold that, if not fully proved, it may be established as far as proved. *Steele* v. *Price*, 5 B. Monr. 58.

The dismissal of a suit in chancery, brought to establish a lost will for want of the statutory evidence, is not conclusive against it, but its existence and fraudulent destruction may be shown in a subsequent partition suit, and by common law evidence. *Harris* v. *Harris*, 26 N. Y. (11 Smith) 433.

In an action to obtain a judicial construction of a will, the testator's intent is to be ascertained if possible from the terms of the will itself, but such terms are frequently ambiguous, and evidence becomes necessary to explain them, or to show to what they apply. How far parol evidence is admissible for that purpose is a question of no little difficulty. The rule given by law-writers generally is, that a latent ambiguity, that is, one which arises not from any uncertainty in the terms of the instrument itself, but from something extrinsic or some collateral matter outside of the instrument, may be explained by extrinsic evidence, but a patent ambiguity cannot be so explained. *Breckenridge* v. *Duncan* or *Duggan*, 2 A. K. Marsh. 50; *Doe* v. *Roe*, 1 Wend. 541; *Tudor*

v. *Terrell*, 2 Dana, 47; *Iddings* v. *Iddings*, 7 S. & R. 111; *Vernor* v. *Henry*, 3 Watts, 385. Thus, a devise of the manor of S. is of itself clear and intelligible, but proof that the testator owned two manors, north S. and south S., raises a latent ambiguity, and the same kind of ambiguity may in a similar manner be created in respect to the person of the legatee or devisee. In such cases it is necessary to show the testator's intention, and that may be shown by evidence of his previous declarations, or of the instructions he gave for drawing his will and by other circumstances of a like nature. In all other cases, parol evidence of the testator's intention should be excluded. 1 Greenl. Ev. 328, etc., and notes; *Oxenden* v. *Chichester*, 4 Dow. 65; 3 Taunt. 147; *Doe d. Thomas* v. *Benyon*, 4 P. & D. 193; 12 A. & E. 431; *Fleming* v. *Fleming*, 1 H. & C. 242; 8 Jur. (N. S.) 1042; 31 L. J. Exch. 419; 10 W. R. 778; 6 L. T. (N. S.) 896; *Doe d. Morgan* v. *Morgan*, 3 Tyr. 179; 1 C. & M. 235; *Whitaker* v. *Tatham*, 7 Bing. 628; 5 M. & P. 628; *Allen* v. *Allen*, 4 P. & D. 220; 12 A. & E. 451; 4 Jur. 985

The rule derived from such cases is, that where the description in the will of the person or thing intended is applicable with legal certainty to each of several subjects, extrinsic evidence is admissible to show which was intended by the testator, but if it is wholly inapplicable to the subject supposed to be intended, such evidence is not admissible to prove who or what the testator really intended. 1 Greenl. Ev. 330; *Miller* v. *Travers*, 8 Bing. 244; *Doe d. Gord* v. *Needs*, 2 M. & W. 129; *Jones* v. *Newman*, 1 W. Bla. 60; *Hamshire* v. *Pierce*, 2 Ves. 216; *Elsworth* v. *Buckmyer*, 1 N. & M. (So. Car.) 431; *Cotton* v. *Smithwick*, 66 Me. 360.

The rule excluding parol evidence to explain a patent ambiguity is not to be so extended, as to shut out evidence of the situation and circumstances of the parties, when that is necessary to a correct understanding of a bequest, but all facts and circumstances respecting persons or property referred to in the will, which may reasonably be supposed to have influenced the testator, or which tend to enable the court to view the provisions of the will from the same point of observation as did the testator, are legitimate evidence. 1 Greenl. Ev. 328; *Crocker* v. *Crocker*, 11 Pick. 252, 257; *Lamb* v. *Lamb*, id. 371, 375; *Colpoys* v. *Colpoys*, Jacob, 464; *Ellis* v. *Essex M. Bridge*, 2 Pick. 243; *Braman* v. *Stiles*, id. 460; *Wheeler* v. *Hartshorn*, 40 Wis. 83.

Where there is no ambiguity, extrinsic evidence is not admissible to alter or change the effect of a will. *Hill* v. *Felton*, 47 Ga. 455; 15 Am. Rep. 653; *St. Luke's Home, etc.*, v. *Assoc. for Indigent Females*, 52 N. Y. 191; 11 Am. Rep. 697. Nor is such evidence admissible

to prove that the testator considered certain land as belonging to him, in order to have it included in a general devise. *Miller* v. *Springer*, 70 Penn. St. 269.

In the exercise of its peculiar jurisdiction in respect to the discovery and enforcement of trusts, if a court of equity in a case involving the construction of a will finds it to be the intention of the testator, unequivocally indicated that a donee under his will shall take for the benefit of another, it will declare the trust and see that it is faithfully executed. And, although the language of the will itself is first to be examined to discover whether it creates a trust, yet parol evidence is admissible to establish a trust, even where the language of the gift is absolute. Thus, it may be shown by parol that the drawer of a will fraudulently inserted his own name in place of that of the legatee intended, and he will be held a trustee for the latter. *Kennell* v. *Abbott*, 4 Ves. 802. Acts of fraud or violence on the part of a devisee, by means of which he prevented the testator from altering his will, may also be shown to convert such devisee into a trustee for the person intended to be benefited by such alteration. *Dixon* v. *Olmius*, Cox's Ch. C. 414. The declarations of a testator made contemporaneously with his will are competent evidence to establish a trust in one to whom an absolute estate is devised, in favor of another for whom he verbally declared a trust, especially when there is evidence that the devise was fraudulently procured by the devisee. *Hoge* v. *Hoge*, 1 Watts, 163. So, also, it may be shown that the heir, personal representative, or residuary legatee induced the testator to omit making a provision in his will for another person by an express promise that he would see that such person should have the legacy intended, or by his silent assent to the request of the testator that he would do so. *Thynn* v. *Thynn*, 1 Vern. 296; *Oldham* v. *Litchfield*, 2 id. 506; *Chamberlaine* v. *Chamberlaine*, 2 Freem. 34; *Reech* v. *Kennegal*, 1 Ves. 123; *Brooks* v. *Chappell*, 34 Wis. 405.

The defendants, in an action to establish a will, may introduce any legal evidence to disprove the due execution or publication of such will, to show that it has been revoked, or that the testator was incompetent to make it, through alienage, infancy, coverture, idiocy, insanity, monomania or *senile dementia*, or that it was procured by fraud or undue influence. Upon the question of the mental capacity of a testator to make his will, his acts and declarations both before and after he executed it, are competent evidence, but they are not admissible where a question of fraud or undue influence is directly involved (*Boylan* v. *Meeker*, 4 Dutcher, 274; *Waterman* v. *Whitney*, 11 N. Y. [1 Kern.] 157); nor are his declarations admissible to show a revocation of his

will, unless they accompanied the acts by which it is claimed to have been revoked, so as to be a part of the *res gestae* (*Bibb* v. *Thomas*, 2 W. Bla. 1043; *Doe* v. *Perkes*, 3 B. & A. 489; *Dan* v. *Brown*, 4 Cow. 483); nor are declarations, made after the execution of a will, manifesting ignorance on the part of the testator as to its existence, competent to show that he did not make it.

In an action to obtain a judicial construction of a will, substantially the same rules will apply in respect to the evidence admissible to sustain or to oppose the construction sought to be established.

§ 3. **Of the decree.** A decree in chancery establishing a lost or destroyed will must, of necessity, have the effect to nullify the probate of a prior will in a court of ordinary probate jurisdiction. The question as to how far the decree of a probate court admitting a will to probate is conclusive, is, therefore, prominent and should receive some attention here. The decisions upon this question are not uniform. By some, the decree is held to be a judicial act, and, like the judgment of any other court of competent jurisdiction, binding upon all the world, until set aside in the mode and within the time allowed by law, so that it cannot be called in question when the will is offered in evidence. *Jourden* v. *Meier*, 31 Mo. 40; *Hall* v. *Hall*, 47 Ala. 290; *Stanley* v. *Morse*, 26 Iowa, 454. By others it is held conclusive only upon parties who were duly notified of the application for probate. *Bresee* v. *Stiles*, 22 Wis. 120; *Ruth* v. *Oberbrunner*, 40 id. 238; *Gaines* v. *Hennen*, 24 How. (U. S.) 553; *Abston* v. *Abston*, 15 La. Ann. 137; *Fuentes* v. *Gaines*, 1 Woods, 112. In California, such decree is held not subject, except on appeal to a higher court, to be questioned in any other court, or to be set aside or vacated by the court of chancery on any ground, even that of fraud. *State* v. *McGlynn*, 20 Cal. 233. The conclusive effect of such a decree extends to the due execution and validity of the will. *Barstow* v. *Sprague*, 40 N. H. 27. But in England, and in some of the American States, the decree is so conclusive only as to the personal estate thereby disposed of, and as to real estate is only *prima facie* evidence. 1 Greenl. on Ev. 518; *Warford* v. *Colvin*, 14 Md. 532.

The same effect is, in some of the States, given to the probate of wills by the courts of other States. *Crippen* v. *Dexter*, 13 Gray, 330; *Crusoe* v. *Butler*, 36 Miss. 150.

The probate of the contents of a spoliated will is *prima facie* evidence, in a subsequent proceeding to contest its validity, not only of its due execution and attestation, but also of its contents. *Banning* v. *Banning*, 12 Ohio St. 437.

Ordinarily a probate court has no general power of opening or re-

versing its decree on the ground of error, but can only correct mistakes; yet, when a later will is produced and offered for probate, that court may revoke the former probate, or its decree may be reversed on appeal. Toller on Ex'rs, 73; Willard on Ex'rs, 478; *Muir* v. *Trustees, etc.*, 3 Barb. Ch. 477. It is, therefore, no bar to proceedings instituted according to law to revoke or modify it, or to establish a will afterward found. *Campbell* v. *Logan*, 2 Bradf. (N. Y.) 90; *Agnew's Appeal*, 37 Penn. St. 467.

The decree of a court of equity establishing or construing a will is, no doubt, as conclusive as its decision in any other case. As to the form of ths decree, when there is sufficient proof to establish a lost or destroyed will, the court will adjudge it to be yet existing and valid. *Voorhees* v. *Voorhees*, 39 N. Y. 463. When the contents of such a will are fully proved, the decree should establish it in all its parts. *Bailey* v. *Stiles*, 1 Green's Ch. 220. When only a part of its contents can be shown, the decree may establish it as far as proved (*Steele* v. *Price*, 5 B. Monr. 58; *Jackson* v. *Jackson*, 4 Mo. 210); or until a more authentic copy can be produced. *McBeth* v. *McBeth*, 11 Ala. 596; *Hampden* v. *Hampden*, 1 P. Wms. 733; MSS. Case, 1 Bro. (P. C.) 250.

Where a trust is shown to exist in favor of the plaintiff, the court may declare such trust, and provide for its enforcement by compelling the payment of money or the performance of the duty devolved upon the trustee. *Ball* v. *Harris*, 4 Myl. & Cr. 264, 267; 3 Jur. 140; *Bailey* v. *Ekins*, 7 Ves. 319; *Shaw* v. *Borrer*, 1 Keene, 559, 576; *Harris* v. *Tisereau*, 52 Ga. 153; S. C., 21 Am. Rep. 242; *Brook* v. *Chappell*, 34 Wis. 405.

Where it is shown that the will was destroyed to prevent a devisee of real estate from obtaining the property devised, equity may grant relief by decreeing to him the possession and enjoyment of such property, or by declaring the person who destroyed it a trustee for such devisee. In an action by an executor to obtain a construction of the will under which he is acting, the court will, by its decree, give a construction to all the provisions brought to its notice, according to the apparent intent of the testator, as nearly as it can arrive at that intent, if it is consistent with law, and will direct the executor to carry out those provisions in accordance with its construction. *Wheeler* v. *Hartshorn*, 40 Wis. 83.

The costs and expenses of an action in equity, brought by an executor or other person appointed to carry into effect the provisions of a will, for the purpose of obtaining a construction of the instrument, or the direction of the court as to the discharge of his duty, are ordinarily

charged by the decree of the court upon the whole estate, they being necessary expenses attending its settlement. *Atty.-Gen.* v. *Jesus College*, 7 Jur. (N. S.) 592; *Wheeler* v. *Thomas*, id. 599; *Rogers* v. *Ross*, 4 Johns. Ch. 608.

§ 4. **When an action will not lie.** As has already been observed, a court of equity has no general jurisdiction in respect to the proof and establishing of wills. No will can be established in equity, unless it was actually in existence at the death of the testator, and has since been accidentally lost or fraudulently suppressed or destroyed, or, if destroyed before his death, was not thereby revoked. *Bulkley* v. *Redmond*, 2 Bradf. (N. Y.) 281; *Buchanan* v. *Matlock*, 8 Humph. 390.

Although a court of equity may entertain a bill to set aside a will on the ground of fraud or undue influence, yet it will not do so in favor of the heir at law, when there are circumstances implicating him in the suppression of the will, or when the evidence in favor of the will is very strong. *Jones* v. *Gregory*, 2 DeG., J. & S. 83; 9 L. T. (N. S.) 556; 9 Jur. (N. S.) 1171.

An heir at law, or other person claiming a mere legal estate in realty under a will which creates no trust, cannot come into equity to obtain a judicial construction of such will. *Bailey* v. *Southwick*, 6 Lans. 356; 56 N. Y. 407; *Meserole* v. *Meserole*, 1 Hun, 66; *Chipman* v. *Montgomery*, 4 id. 739; S. C. affirmed, 63 N. Y. (18 Sick.) 221. And it is only when some doubt arises as to its construction, or some difficulty appears in determining his duty under it, that an executor or administrator can do so.

# PART II.

## DEFENSES.

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## CHAPTER I.

### ABATEMENT.

### ARTICLE I.

#### WHAT ARE GROUNDS OF ABATEMENT.

**Section 1. Definition and nature.** Whenever the subject-matter of the plea or defense is, that the plaintiff cannot maintain *any* action *at any time*, whether present or future, in respect of the supposed cause of action, it may, and usually must, be pleaded in *bar;* but matter which merely defeats the *present* proceeding, and does not show that the plaintiff is *forever* concluded, should in general be pleaded in *abatement*, from the French *abattre*. The criterion or leading distinction between a plea in *abatement* and a plea in *bar* is, that the former must not only point out the plaintiff's error, but must show him how it may be corrected, and furnish him with materials for avoiding the same mistake in another suit in regard to the same cause of action, or, in technical language, *must give the plaintiff a better writ.* There are, however, some matters which may be pleaded either in abatement or in bar; as in replevin for goods, the defendant may plead property in himself or in a stranger (*Ilsley* v. *Stubbs*, 5 Mass. 280, 285; *Harrison* v. *McIntosh*, 1 Johns. 380); either in abatement or in bar. So, outlawry for felony, alien enemy (*Bell* v. *Chapman*, 10 Johns. 183); at the time of the contract, and attainder, by either of which the cause of action was *forfeited*, may be pleaded in abatement or in bar, and when the defendant has omitted to plead such matter in abatement in due time, he must plead in bar. 1 Chitty on Plead. (7th Am. ed.) 480.

Pleas in abatement are required to be strictly correct and accurate, and if they commence or conclude in bar they will be overruled though the matter be properly in abatement. *Settle* v. *Settle*, 10 Humph. (Tenn.) 504. The plea must exclude every conclusion against the pleader; and so a plea, that a person who signed an attachment-bond for the plaintiffs had no competent authority from them to make it, is defective, unless it also avers that the act was not subsequently adopted and ratified by the plaintiffs. *Mandell* v. *Peet*, 18 Ark. 236. And if a plea to the action is made, the plea in abatement is waived. *Hotchkiss* v. *Thompson*, 1 Morris (Iowa), 156. See *Hastings* v. *Bolton*, 1 Allen (Mass.), 529. So, if a party pleading in abatement goes to trial on the merits, he cannot afterward object that the plea in abatement was undisposed of. *Starr* v. *Wilson*, 1 Morris (Iowa), 438.

The above are common-law rules and are in some degree, perhaps, changed by the practice and statutes in nearly every State in the Union.

Where the real party in interest and the one intended to be sued is actually served with process in the cause, even though under a wrong name, he must take advantage of the mis-nomer by plea in abatment in such suit, and if he does not, he will be concluded by the judgment or decree rendered, the same as if he were described by his true name. And this rule applies as well to an infant as to adult defendants. *Pond* v. *Ennis*, 69 Ill. 341. The non-joinder of a co-contractor can be taken advantage of only by plea in abatement. *Collins* v. *Smith*, 78 Penn. St. 423; *Hinman* v. *Eakins*, 26 Mich. 80; see *Goggin* v. *O'Donnell*, 62 Ill. 66; *Hapgood* v. *Watson*, 65 Me. 510. A plea must generally set up matters not apparent in the declaration. The instances to the contrary are rare. *Hinman* v. *Eakins*, 26 Mich. 80. And a variance between the writ and the declaration cannot be taken advantage of in arrest of judgment, but only by plea in abatement, or by motion. *Toledo, etc., R. Co.* v. *McLaughlin*, 63 Ill. 389; *Simons* v. *Waldron*, 70 id. 281.

§ 2. **Matters of jurisdiction.** Want of jurisdiction may be taken advantage of by plea in abatement. *Ingalls* v. *Richardson*, 3 Metc. 440; *Osgood* v. *Thurston*, 23 Pick. 110; *Smith* v. *Elder*, 3 Johns. 108, 110. And it must be taken advantage of before making any plea to the merits if at all, when it arises from formal defects in the process, or when the want is of jurisdiction over the person. *Smith* v. *Curtis*, 7 Cal. 584; *The Clyde, etc., Plank Road Co.* v. *Parker*, 22 Barb. 323; *Bohn* v. *Devlin*, 28 Mo. 319. But see *Carlisle* v. *Weston*, 21 Pick. 535. But where the cause of action is not within the jurisdiction granted by law to the tribunal, it will dismiss the suit at any time

when the fact is brought to its notice. *Gormly* v. *McIntosh*, 22 Barb. 271; *Baker* v. *Bradfield*, id.; *King* v. *Poole*, 36 Barb. 242; *Wildman* v. *Rider*, 23 Conn. 172; *Thompson* v. *Morton*, 2 Ohio St. 26; *Brownfield* v. *Weicht*, 9 Ind. 394. Where a subordinate court, which had no jurisdiction of the case, has given judgment for the plaintiff or the defendant, or improperly decreed affirmative relief to a claimant. an appellate court must reverse the judgment or decree. *United States* v. *Huckabee*, 16 Wall. 414, 435. It is not enough to dismiss the suit. Id. Vol. 1, p. 45. Mere defects in the service, or *teste*, or place of return, may, when the court has jurisdiction in other respects, be waived. *Carlisle* v. *Weston*, 21 Pick. 535. So a defective return on a summons can only be taken advantage of by a plea in abatement. *Hinton* v. *Ballard*, 3 West Va. 582; *Barksdale* v. *Neal*, 16 Gratt. (Va.) 314. An action before a justice of the peace does not abate because a return is made on the summons that the defendant cannot be found, when at the same time it is made to appear that the defendant is concealing himself to avoid process; but the magistrate may issue a new summons and order notice by publication. *Seaver* v. *Fitzgerald*, 23 Cal. 85. Nor is an attachment vitiated by such a state of facts. Id. An omission in a summons to state the form of action is material, and a good cause of abatement. *Colby* v. *Dow*, 18 N. H. 557. But a writ will not be abated on the ground that the residence of the defendant alleged in the summons is not the same as that alleged in the writ, when the person and cause may be rightly understood by the court. *Adams* v. *Wiggin*, 42 N. H. 553. Where total want of authority in the person who undertook to serve a writ appears on the face of the process, the defect may be taken advantage of by a plea in abatement or a motion to dismiss. *Howard* v. *Walker*, 39 Vt. 163. Service of a writ by the coroner instead of the sheriff, without cause shown, operates to abate the writ, but not the action. *Beard* v. *Smith*, 9 Iowa (1 With.), 50. But after a general appearance and answer filed in behalf of two defendants, and one trial had without objection to any defect of service or jurisdiction, a defendant who has personally attended at a second trial cannot object that the court, in fact and by the record, has not acquired jurisdiction of his person. *Loomis* v. *Wadhams*, 8 Gray, 557.

A plea to the jurisdiction of a court in a transitory action is proper only when some court of the nation has jurisdiction of the cause of action, and not the court in which the suit is brought, and the plea must allege such jurisdiction or it is ill. *Rea* v. *Hayden*, 3 Mass. 24; *Jones* v. *Winchester*, 6 N. H. 597. Such plea must be made by the defendant *in propria personæ*, and on oath. *Teasdale* v. *The Rambler*, Bee. 9; *Hortons* v. *Townes*, 6 Leigh, 47. But when no court in

the nation has jurisdiction the exception may be taken under the general issue without a plea to the jurisdiction. *Rea* v. *Hayden*, 3 Mass. 24. So when the subject-matter is not within the jurisdiction of the court. *Maisonnaire* v. *Keating*, 2 Gallis. 325. See *Osgood* v. *Thurston*, 23 Pick. 110.

A plea to the jurisdiction of a court, alleging that the matter in suit does not amount to the sum requisite to give the court jurisdiction, is a good plea in abatement. *Bridge* v. *Ballew*, 11 Tex. 269; *Small* v. *Gwinn*, 6 Cal. 447. And when it appears on the record that the court has not jurisdiction of the parties, and a plea to the jurisdiction is filed which is bad as such, the court will stay proceedings. *Lawrence* v. *Smith*, 5 Mass. 362.

Quashing a writ does not abate the suit. *Minott* v. *Vineyard*, 11 Iowa, 90. A party must take advantage of a variance between the writ and the declaration by plea in abatement. *Carpenter* v. *Hoyt*, 17 Ill. 529.

If a defendant wishes to contest the citizenship of the parties to an action in the national courts, he must do so by plea in abatement. *Wythe* v. *Myers*, 3 Sawyer, 595. So where a defendant does not reside in the State where the suit is brought, but is served with process there, he may plead the matter in abatement. If he does not plead it in abatement he cannot set it up afterward. *Searls* v. *Jacksonville, P. & M. R. R. Co.*, 2 Woods, 621. The enticing of a defendant residing in Canada within the jurisdiction of the court for the purpose of effecting service upon him, will not be sanctioned by the court, and the service of the summons and all subsequent proceedings in the action dependent thereon will be vacated. *Metcalf* v. *Clark*, 41 Barb. 45; 1 Wait's Prac. 541. See *Stanton* v. *Crosby*, 9 Hun (N. Y.), 370.

If a married woman sues alone when she might be joined with her husband, the objection can only be pleaded in abatement. *Huftalin* v. *Misner*, 70 Ill. 205. See *Royce* v. *Vandusen*, 49 Vt. 26.

In an action on a note signed by two makers, the objection that one is not joined as a defendant can only be taken by plea in abatement. Objection to the note, when offered in evidence under the general issue, is untenable. *Hyde* v. *Lawrence*, 49 Vt. 361. So where a party who is sued as a corporation seeks to raise the question whether the defendant is a corporation, upon matters *dehors* the record, the question is one to be presented by plea in abatement, and not by motion. *American Express Co.* v. *Haggard*, 37 Ill. 465. And if an action is brought in the wrong county, that fact should be pleaded in abatement. The general issue waives the objection. *Demuth* v. *Cutler*, 50 Me. 298. The conviction and sentence to the State prison of a party defendant, pend-

ing the action against him, do not abate the action. *Davis* v. *Duffie*, 8 Bosw. (N. Y.) 617; S. C. affirmed, 4 Abb. (N. S.) 478; S. C., 3 Keyes, 606; *Bonnell* v. *Rome, etc., R. R. Co.*, 12 Hun (N. Y.), 218. And see *Matter of Niles*, 5 Daly (N. Y.), 465; *Hix* v. *Sumner*, 50 Me. 290.

A defendant cannot plead in abatement matter which affects his co-defendant alone, as that such co-defendant was a deputy of the sheriff who served the writ. *Bonzey* v. *Redman*, 40 Me. 336.

It is an ancient and well-established principle that a writ is divisible which is brought for a cause that is divisible, and may be abated in part, and remain good for the residue. *Johnson* v. *Ransom*, 24 Conn. 531.

§ 3. **Pendency of another action.** The pendency of a suit is a good defense to a second action between the same parties for the same cause. *Harris* v. *Johnson*, 65 N. C. 478; *Prosser* v. *Chapman*, 29 Conn. 515. But in order that the defense may be used it must be set up by plea or answer. A motion to dismiss for that reason is improper. *Morton* v. *Sweetser*, 12 Allen (Mass.), 134; *Rizer* v. *Gillpatrick*, 16 Kans. 564. But the plea or answer must aver the pendency of the former suit at the time the plea is filed. *Archer* v. *Ward*, 9 Gratt. (Va.) 622; *Hope* v. *Alley*, 11 Texas, 259. A second suit will not be abated on the plea that another suit for the same cause is pending, unless the parties are the same, nor if the first suit was dismissed before the plea in the second suit was filed. *Adams* v. *Gardiner*, 13 B. Monr. 197.

The fact that another action is pending between the parties, although founded on the same indebtedness or liability, does not abate an action of common-law cognizance, unless the prior action is also a common-law action of the same nature with the second one. While a double satisfaction is never allowed, concurrent and cumulative remedies are not forbidden. Thus, proceedings *in rem* and *in personam*, to collect the same demand, do not necessarily interfere until satisfaction is obtained in one. *The Kalorama*, 10 Wall. 204; *Harmer* v. *Bell*, 7 Moore (P. C. C.), 267; 22 Eng. L. & Eq. 62; *Duncan* v. *Hill*, L. R., 8 Exch. 242; S. C., 6 Eng. 308; *Nelson* v. *Couch*, 15 C. B. (N. S.) 99. Nor do actions on a joint liability, and on a several liability, in respect to the same debt. *Lowter* v. *Dunston*, 1 Mann. & R. 508; *Wise* v. *Prowse*, 9 Price, 393; *Henry* v. *Nash*, 1 Exch. 826; *Giles* v. *Tooth*, 3 C. B. 665; S. C., 3 M. G. & S. 665; *Newton* v. *Belcher*, 9 Q. B. 612. Nor do proceedings to forfeit shares and an action for calls. *Great Northern Railway* v. *Kennedy*, 4 Exch. 417; *Inglis* v. *Great N. Ry. Co.*, 1 H. L. Cas. 112; 16 Eng. L. & Eq. 55. Nor do proceedings in bankruptcy (*Covington* v. *Hogarth*, 7 Mann. & G. 1013); or on a judge's order for payment (*Wade* v. *Simeon*, 1 C. B. 610); warrant staying a common-law

action for the debt. Nor will proceedings in other than common-law courts, unless they are identical in scope with the common-law suit (*Ostell* v. *Le Page*, 21 Eng. L. & Eq. 640; *Miles* v. *Bristol*, 3 Barn. & Ad. 945), warrant a common-law court in staying a pending action. *Dicas* v. *Jay*, 6 Bing. 519; *Foreman* v. *Jayes*, 5 Barn. & Ad. 835; *Davis* v. *Salter*, 2 Cromp. & J. 466; *Tatersall* v. *Groote*, 2 Bos. & P. 131, 137; *Smidt* v. *Ogle*, 6 Taunt. 74; *Philips* v. *Huth*, 6 Mees. & W. 572, 595. Hence a common-law action to recover for services in fitting out a vessel for sea, and for wages as master on the voyage, is not abated by, nor should it be stayed on motion on account of the pendency of an action *in rem*, in the district court of the United States, to enforce payment of the same demand against the vessel. *People* v. *Judge of Wayne Circuit*, 27 Mich. 406; 15 Am. Rep. 196. In an action of ejectment, a plea in abatement of the pendency of an action to quiet the title cannot defeat the action; though the same questions are litigated in both. *Bolton* v. *Landers*, 27 Cal. 104. So, in trespass to try titles, the pendency of another action between the parties for the same premises is not good matter for a plea in abatement. *Hall* v. *Wallace*, 25 Ala. 438.

The ground upon which courts proceed in abating a subsequent suit upon the ground of a pendency of a former one between the same parties and for the same cause is, that the subsequent suit is unnecessary, and is therefore vexatious. But the modern practice is, not to infer this from the mere pendency of the prior suit, but to inquire into the actual circumstances of the two cases, and then to determine, as matter of fact, whether the second suit is unnecessary and vexatious. *State* v. *Dougherty*, 45 Mo. 294. But the pendency of two suits brought by one plaintiff against one defendant for one cause, at one time, is cause of abating the second suit without inquiry into the fact of actual vexatiousness and oppression; and notwithstanding the plaintiff, before commencing the second, gave the defendant a written notice that he discontinued the first. *Gamsby* v. *Ray*, 52 N. H. 513.

A plea in abatement, setting up the pendency of a suit for the same cause of action, will not be sustained, if such suit was a nullity (*Phillips* v. *Quick*, 68 Ill. 324); or where the first writ is so defective that no recovery could be had (*Rogers* v. *Hoskins*, 15 Ga. 270); or where the complaint is so defective that no judgment could properly be rendered thereon. *Reynolds* v. *Harris*, 9 Cal. 338. And the pendency of a suit for the same cause of action in a court having no jurisdiction is not sufficient to abate a subsequent suit instituted in a court that has the rightful jurisdiction. *Rood* v. *Eslava*, 17 Ala. 430. So, the pendency of a foreign suit cannot be pleaded, even in a transitory action, in bar

of a suit for the same cause within the State. *Eaton, etc., R. R. Co.* v. *Hunt*, 20 Ind. 457; *Lyman* v. *Brown*, 2 Curtis (C. C.), 559. So, it is no ground for staying proceedings in an action in England, that proceedings are pending between the parties for the same cause of action in the United States. *Cox* v. *Mitchell*, 7 C. B. (N. S.) 55. The pendency of a prior suit in a State court is not a bar to a suit in a circuit court of the United States, or in the supreme court of the District of Columbia, by the same plaintiff against the same defendant for the same cause of action. *Stanton* v. *Embrey*, 93 U. S. (3 Otto) 548; *Parsons* v. *Greenville, etc., R. R. Co.*, 1 Hugh. 279; *Loring* v. *Marsh*, 2 Cliff. 311; *White* v. *Whitman*, 1 Curtis (C. C.), 494. The plea in abatement for such cause must show jurisdiction of the former suit, if pending in a court not under the same sovereignty. *White* v. *Whitman*, 1 Curtis (C. C.), 494; *Ex parte Balch*, 3 McLean, 221. But the pendency of another action for the same cause in the circuit court of the United States, having jurisdiction, is a good plea in abatement in the State courts for the same district. *Smith* v. *Atlantic Mutual Fire Ins. Co.*, 22 N. H. 21. Otherwise, if it be for a district in another State. *Sloan* v. *McDowell*, 75 N. C. 29. See *Loyd* v. *Reynolds*, 29 Ind. 299. And the mere pendency of a suit against the defendant in another State cannot be pleaded in bar or in abatement of an action, even if between the same parties and for the same cause of action. *Allen* v. *Watt*, 69 Ill. 655; *Trabue* v. *Short*, 5 Cold. (Tenn.) 293; *Yelverton* v. *Conant*, 18 N. H. 123. But the pendency of a suit in a State court of another State, in which property enough to satisfy the demand has been attached, is ground for abatement of a suit in a United States circuit court. *Lawrence* v. *Remington*, 6 Biss. (C. C.) 44. To nearly same effect, *Nelson* v. *Foster*, 5 id. 44; *United States* v. *Dewey*, 6 id. 501. A prior suit will not be abated by a plea that another action for the same cause was afterward commenced. *Wood* v. *Lake*, 13 Wis. 84.

Pendency of another action in which the parties to this are defendants, and in which this plaintiff might, by cross petition, obtain the relief sought in this, is not a ground for abatement. *Osborn* v. *Cloud*, 23 Iowa, 104. In such case the question is not whether the debt for which the second suit was brought could have been included in the first action, but whether it was so included. *Chase* v. *Ninth, etc., Bank*, 56 Penn. St. 355.

The pendency of a statutory arbitration, duly pleaded in a subsequent action between the parties to recover a demand included in the submission, is a good defense in abatement. *Fahy* v. *Brannagan*, 56 Me. 42. A suit against a national bank to enforce the collection of a demand is abated by a decree of a district court of the United States dissolving the

corporation and forfeiting its rights and franchises, rendered upon an information against the bank filed by the comptroller of the currency. *National Bank* v. *Colby*, 21 Wall. 609.

It is no ground for abatement of an action at law, that a suit in equity is pending, in which the plaintiff asks for a decree of the same money, where the result of the action may be necessary for the perfecting of a decree in that suit. *Kittredge* v. *Race*, 92 U. S. (2 Otto) 116. But see *Williamson* v. *Paxton*, 18 Gratt. (Va.) 475.

The pendency of an action in which one defendant by his answer therein attempted to force a co-defendant to settle therein a controversy respecting the right of such co-defendant under a certain instrument, cannot be pleaded in bar or abatement, as another action pending to an action subsequently commenced on said instrument by such co-defendant against the defendant who so answered in the first action. *Fink* v. *Allen*, 4 Jones & Sp. (N. Y.) 350. A defendant cannot be allowed to defeat an action at law against him, by pleading the existence of a pending suit brought by himself against his adversary. *New England Screw Co.* v. *Bliven*, 3 Blatchf. (C. C.) 240.

§ 4. **Death of party to action.** At common law an original suit abated by the death of a natural person. *Torry* v. *Robertson*, 24 Miss. 192. And the death of a sole plaintiff who dies pending his suit at common law may be pleaded in abatement. *Thayer* v. *Dudley*, 3 Mass. 296; *Livingston* v. *Abel*, 2 Root (Conn.), 57; *Drago* v. *Stead*, 2 Rand. (Va.) 454; *Ryder* v. *Robinson*, 2 Me. 127. But it is now otherwise by statute in most cases both in England and the United States, and the personal representatives are usually authorized to act in such cases. If the cause of action is such that the right dies with the person the action still abates. In ejectment at common law the death of the lessor of the plaintiff did not abate the suit, but it might be continued in the name of the nominal plaintiff for the recovery of the land and nominal damages, and where the action for mesne profits was commenced in the name of the nominal plaintiff, as it might be, the suit would be unaffected by the death of any party in interest on the part of the plaintiff. *Ex parte Swan*, 23 Ala. 192. See *Kinney* v. *Beverley*, 1 H. & M. (Va.) 531; *Frier* v. *Jackson*, 8 Johns. 495; *Howard* v. *Moale*, 2 Harr. & J. (Md.) 249; *Bonta* v. *Clay*, 5 Litt. (Ky.) 129; *Thomas* v. *Kelly*, 13 Ired. 43.

The death of a sole defendant pending an action at common law abates the action. *McKee* v. *Straub*, 2 Binn. (Penn.) 1; *Farmer* v. *Frey*, 4 McCord (S. C.), 160; *Macker's Heirs* v. *Thomas*, 7 Wheat. 530. But where one of several co-defendants dies pending the action, his death is in general no cause of abatement even at common law.

*Harrison* v. *King*, Minor, 364; *Bundy* v. *Williams*, 1 Root (Conn.), 543; *Low* v. *Mumford*, 14 Johns. 426. The action abates as to such defendant, but the court may notwithstanding proceed to hear the cause at the proper term against the survivors. *Garrett* v. *Lynch*, 44 Ala. 324. The plaintiff may proceed against the survivors by suggesting the death upon the record. *Torry* v. *Robertson*, 24 Miss. 192. In the United States on the death of a sole defendant, his personal representatives may be substituted if the action could have been originally prosecuted against them.

The right of action against a tort-feasor dies with him, and such death should be plead in abatement (*O'Connor* v. *Corbitt*, 3 Cal. 370); so the death of the defendant abates an action of replevin (*Mellin* v. *Baldwin*, 4 Mass. 480; *Merritt* v. *Lumbart*, 8 Me. 128); an action of trover (*Barnard* v. *Harrington*, 3 Mass. 228); an action of trespass, if he died before verdict (*Harris* v. *Crenshaw*, 3 Rand. [Va.] 14; *Clarke* v. *McClelland*, 9 Penn. St. 128); but an action of trespass *quare clausum fregit* is not at common law abated by the death of one of several defendants. *Hendrickson* v. *Herbert*, 38 N. J. Law, 296. If the defendant die after verdict, and before judgment, the court will enter judgment as of the term when the verdict was returned (*Perry* v. *Wilson*, 7 Mass. 395); in an action of ejectment (*Anon.*, 1 Hayw. [N. C.] 500); an action of slander, though after an appeal from judgment against him. *Long* v. *Hitchcock*, 3 Ham. (Ohio) 274.

By the common law, death of parties before judgment, in real and personal actions abates the suit, and it is only by statutory provisions that the suit where the cause of action survives can be prosecuted by or against the representatives of the deceased. *Green* v. *Watkins*, 6 Wheat. 260. And where the cause of action is money due, or a contract to be performed, gain or acquisition by the labor or property of another, or a promise by a testator, express or implied, the action survives against the executor; otherwise, if it is a tort, or arises *ex delicto*, supposed to be by force and against the peace. *Hambley* v. *Trott*, Cowp. 371, 375. See *Knox* v. *City of Sterling*, 73 Ill. 214.

Where one of several plaintiffs dies, the survivors must, if they desire to bring that fact to the knowledge of the court in any proceeding in the cause, enter a suggestion of it. *Larchin* v. *Buckle*, 1 L. M. & P. 740; *Pinkus* v. *Sturch*, 5 C. B. 474; *Barnewall* v. *Sutherland*, 9 id. 380; S. C., 14 Jur. 720. The action for a trespass *quare clausum fregit* does not abate by the death of one of several plaintiffs. *Haven* v. *Brown*, 7 Me. 421; *Boynton* v. *Rees*, 9 Pick. 528: *Wilson* v. *Slaughter*, 3 J. J. Marsh. (Ky.) 593.

Where the cause of action survives, the action does not necessarily

abate, but may be declared abated in the discretion of the court. Hence, where a plaintiff during the pendency of an action assigned his interest therein to a third party, and then died, it was held (the cause of action surviving) that the court below did not err in permitting the record to be amended, so as to make the assignee a party plaintiff. *Moore* v. *N. C. R. R. Co.*, 74 N. C. 528.

Where husband and wife commence an action for a cause of action that accrued to the wife before marriage, the death of the wife during the pendency of the action will abate it. *Checchi* v. *Powell*, 6 B. & C. 253; S. C., 9 D. & R. 243. See *Ryder* v. *Robinson*, 2 Me. 127; *Archer* v. *Colly*, 4 H. & M. (Va.) 410. And a suit against husband and wife, on her contract *dum sola*, abates as to him on his death (*Nutz* v. *Reutter*, 1 Watts, 229); but a suit against husband and wife for a tort does not abate by his death, unless the tort was committed by her in his presence or by his coercion. *Douge* v. *Pearce*, 13 Ala. 127.

An action for libel does not survive the death of the defendant (*Moore* v. *Bennett*, 65 Barb. 338); so it abates by the death of the plaintiff, after the signing of interlocutory judgment, and before the execution or return of a writ of inquiry. *Ireland* v. *Champneys*, 4 Taunt. 884.

Death of either party after verdict, and before judgment, does not abate a suit (*Gaines* v. *Conn*, 2 Dana, 231); an agreement that a suit shall not abate by the death of either party is obligatory, and being entered of record, operates as a release of errors (*Garlington* v. *Clutton*, 1 Call [Va.], 452); so in an action against a railroad company to recover damages for injuries sustained by a passenger in consequence of being unlawfully ejected from its cars, the defendant's counsel, as a condition of putting a cause over a circuit, stipulated that, in case of the death of the plaintiff before final judgment and determination of the action, the alleged cause of action should survive, and any verdict and judgment be regarded as if rendered in the plaintiff's life-time, and also that, in case of such death, the plaintiff's representative might be substituted as the plaintiff. And it was held, that this stipulation continued in force until final judgment, although meanwhile a verdict and judgment in the plaintiff's favor had been set aside. *Cox* v. *New York Central, etc., R. R. Co.*, 63 N. Y. (18 Sick.) 414.

An action for damages for an injury to the person of the plaintiff abates by his death, and the pendency thereof cannot be pleaded in bar of an action brought by his personal representative for his death resulting from such injury, and caused by the wrongful act or omission of the defendant. *Indianapolis, etc., R. R. Co.* v. *Stout*, 53 Ind. 143. See

*Baltimore, etc., R. R. Co.* v. *Ritchie*, 31 Md. 191; *Gibbs* v. *Belcher*, 30 Tex. 79.

Upon the death of a sole defendant in a suit for the infringement of a patent (there being no allegation of an infringement against the executor and no prayer for an injunction against him), the right to an injunction fails, and this, the principal right being extinct, the right to have an accounting of profits which is incidental only is lost also. *Draper* v. *Hudson*, 1 Holmes, 208. Where there are two assignees of a patent, and one of them dies, the action for an infringement in his life-time descends to the survivor, who is entitled to recover the whole damages. *Smith* v. *London North Western R. Co.*, 2 El. & Bl. 69; 17 Jur. 1071.

Where, pending an action on a sheriff's bond, the sheriff and one of the sureties die, the plaintiff may proceed against the surviving sureties. *Bullock* v. *King*, 48 Ga. 550.

At common law, if the plaintiff in error dies after error assigned, it does not abate the writ, and a writ of error does in no case abate by the death of the defendant in error, whether it happen before or after errors assigned. *Carroll* v. *Bowie*, 7 Gill (Md.), 34; *Burns* v. *Stanton*, 24 Miss. 580; *Walpole* v. *Smith*, 4 Blackf. (Ind.) 151. An action against an administrator abates by his death. *Portevant* v. *Pendleton*, 23 Miss. 25.

The right of action to recover the principal sum mentioned in an agreement to pay a specified sum to a payee named "personally when she shall require it, but to no other person," and meantime to pay interest arising after a demand made during the life-time of the payee, does not abate by the death of the payee. *Brewster* v. *Brewster*, 52 N. H. 52. A plaintiff died within a year of the service of the writ of summons without taking any further step in the action, and it was held that the circumstances did not take the action out of the rule. *Harper* v. *Peddie*, 33 L. T. (N. S.) 839.

§ 5. **The privilege or disability of a party.** Matter in abatement arising out of personal privilege can only be pleaded in person, and not by an attorney of the court. An appearance by attorney waives the objection to the process and gives the court jurisdiction. *Shelby* v. *Johnson*, 7 Humph. (Tenn.) 503.

*Coverture* of the plaintiff is at common law pleadable in abatement. When a *feme covert* has no interest whatever in the subject-matter of the action and consequently ought not to be made a party, and she sues either with or without her husband, the defendant will obtain a nonsuit on a plea in bar of her coverture, or a plea in replevin that she had no property in the goods. But where she was legally interested before or during her coverture in the subject-matter of the action, and might

properly join with her husband, but sues alone, her coverture can only be pleaded in abatement, and cannot be given in evidence under the general issue, or pleaded in bar. *Hubert* v. *Fera*, 99 Mass. 198; *Huftalin* v. *Misner*, 70 Ill. 205; *Dutton* v. *Rice*, 53 N. H. 496, 499. At least this rule obtains in action for torts. If the plaintiff take a husband after suing out the writ, and before the declaration, the defendant cannot give the coverture in evidence under the general issue, but must plead it in abatement as matter arising before plea or pending the suit. 1 Chit. Plead. (16th Am. ed.) 465; *Northum* v. *Kellogg*, 15 Conn. 569; *Wilson* v. *Hamilton*, 4 Serg. & R. 238; *Morgan* v. *Painter*, 6 Term R. 265. If a *feme sole* administratrix marry pending an action, commenced by her, the suit abates. *Swan* v. *Wilkinson*, 14 Mass. 295; *Parlin* v. *Haynes*, 5 Me. 178. But if she be one of several administrators, and marry pending an action brought by them all, the action is not thereby abated. *Newell* v. *Marcy*, 17 Mass. 341. Coverture of the plaintiff, since the suit, cannot be pleaded after a plea in bar; unless it takes place after the plea in bar, in which case it may be done; but the defendant must not suffer a continuance to intervene between the happening of this new matter, or its coming to his knowledge and pleading it. *Wilson* v. *Hamilton*, 4 Serg. & Rawle, 238. One sued by a married woman who declares as a *feme sole* in a case, where she has no right so to sue, may plead such disability in abatement. *Dalton* v. *Rice*, 53 N. H. 496. But coverture between the parties to the action can only be pleaded in bar, as it is impossible in such case to give the party a better writ. *Steer* v. *Steer*, 14 Serg. & Rawle, 379.

Where a *feme covert* is sued without her husband for a cause of action that would survive against her, as upon a contract made before, or a tort committed after marriage, the coverture is pleadable in abatements, and not otherwise. *Lovell* v. *Walker*, 9 Mees. & W. 299. Vol. 3, pp. 654, 655, 675. If the marriage takes place pending the action, it cannot be pleaded. *Crockett* v. *Ross*, 5 Me. 443; *Henderson* v. *McClure*, 2 McCord's (S. C.) Ch. 466. Any thing which suspends the coverture suspends also the right to plead it.

Non-joinder of a defendant in an action on contract can be pleaded in abatement only. *Shelton* v. *Banks*, 10 Gray, 401; *Briggs* v. *Taylor*, 35 Vt. 57; *True* v. *Congdon*, 44 N. H. 48. And where a suit has been properly brought, the defendant cannot cause its abatement by afterward creating a state of facts against the ability of the plaintiff to sue. *Commissioners of Tippecanoe* v. *Lafayette M. & B. R. R. Co.*, 50 Ind. 85.

The fact that the defendant is not the owner of the property attached

is not good matter for a plea in abatement. *Sims* v. *Jacobson*, 51 Ala. 186.

A champertous contract between the plaintiff and his attorney, in an action for damages, is no ground for the abatement of the action. *Allison* v. *Chicago, etc., R. R. Co.*, 42 Iowa, 274.

§ 6. **Transfer or defect in plaintiff's title.** It is a good defense in abatement to an action by an indorsee, upon a note to show that the note rightfully belongs to the estate of a former holder who is deceased, and that the indorsement by which the plaintiff holds it was made by the widow without taking out administration or otherwise acquiring any legal title, and that the estate is largely indebted. And these facts ought to be pleaded, they are not admissible under a general denial. *Stebbins* v. *Goldthwaite*, 31 Ind. 159. But see *Taylor* v. *Littell*, 21 La. Ann. 665. So a plea in abatement in an action on a promissory note brought in the name of an alleged indorsee was sustained on the ground that the indorsement was solely for the purpose of bringing suit in his name in a county in which the defendant did not reside. *Parsons* v. *Brown*, 50 N. H. 484.

Under the laws of Iowa, a conveyance by the plaintiff, during the pendency of an action of right, of the title to the property, will not abate the action ; the prosecution thereof may be continued in his name notwithstanding. *Jordan* v. *Ping*, 32 Iowa, 64. In Texas, if, pending an action of trespass, the plaintiff sell his interest in the land to other parties, the action will abate. The purchaser cannot be allowed by the court to become plaintiff in the place of the original plaintiff. But if, after such a sale, the original plaintiff recovers judgment, it will inure to the benefit of his vendee. *Hearne* v. *Erhard*, 33 Tex. 60.

Where a note sued on is assigned during the pendency of the suit, the assignee may intervene and have the benefit of the proceedings, and prosecute the suit to judgment, although the defendant may have died before his purchase of the note. *Converse* v. *Sorley*, 39 Tex. 515. And, generally, a cause of action arising on contract, upon which suit has been commenced, may be assigned, and the action continued for the benefit of the assignee in the name of the original plaintiff. *Arnold* v. *Keyes*, 5 Jones & Sp. (N. Y.) 135.

§ 7. **Termination of powers of trustee or officer.** A change in the incumbent of an office, pending a suit, does not abate the suit and make it necessary to begin *de novo*, if the successors are charged with the same duties. *McDuff* v. *Beauchamp*, 50 Miss. 531; *Hardee* v. *Gibbs*, id. 802. But where an overseer of the poor of a town, as relator, obtained a common-law writ of *certiorari* to review proceedings in

a bastardy case instituted by him, and after the writ was served, and a return thereto made, his term of office expired, it was held that his successor in office could not be substituted as relator. *People* v. *Oswego County Court of Sessions*, 2 Thomp. & C. (N. Y.) 431.

Where an insurance company, duly organized under the laws of New York and of which the defendant was the receiver, voluntarily submitted to the jurisdiction of the court of common pleas of the county of Cuyahoga, State of Ohio, and it appeared from the case that this court had jurisdiction over the cause at the commencement of the action, it was held, 1. That the action did not abate by the dissolution of the company and the appointment of the defendant as receiver thereof during the pendency of the action, although these facts became known to the plaintiff and no substitution of the defendant was made therein.

2. That a judgment, entered in said action in favor of the plaintiff and against the company, was valid and binding upon and against the defendant, the receiver of said company. *McCollough* v. *Norwood*, 4 Jones & Sp. (N. Y.) 180; affirmed, 58 N. Y. (13 Sick.) 562.

§ 8. **Irregularities in the proceedings.** Any irregularity, defect or informality in the terms, form or structure of the writ or in the mode of issuing it, is ground of abatement. *Renner* v. *Reed*, 3 Ark. 339. See *Feneley* v. *Mahoney*, 21 Pick. 212; *Parsons* v. *Ely*, 2 Conn. 377; *Jordan* v. *Bell*, 8 Port. (Ala.) 53; *Cook* v. *Lothrop*, 18 Me. 260. But defects and irregularities apparent on a writ of summons must be the subject of motion and cannot be taken advantage of by a plea in abatement, unless the mistake be also carried into the declaration. *Campbell* v. *Chaffee*, 6 Fla. 724. So, too, a defective or irregular service of process may be set aside on motion, but is not good matter for a plea in abatement. *Jones* v. *Nelson*, 51 Ala. 471. But a variance between the summons and complaint, when an available defect, is proper matter for a plea in abatement to the summons only and not for a motion to strike the complaint from the files. *Stoddard* v. *Davis*, 50 Ala. 21.

The sheriff's return of service on original process does not import absolute verity, but is only *prima facie* evidence of the truth of the matters therein recited, and consequently may be put in issue before judgment by plea in abatement. This rule is not sustained by early decisions, but is warranted by later ones and is in accordance with justice. Considered as a question of abstract right, there can be no good reason why a party shall be denied to show to the court which is about to render judgment against him that he is not, in fact, within its jurisdiction, and compelled to suffer a present wrong with the mere probability of being able to repair it by another action against the officer by whose act it

was caused. By allowing the truth of the return to be questioned before judgment, the delinquency or dishonesty of the officer is more speedily shown, there is greater certainty that injustice is not done by rendering judgment against those who, in fact, have not had the notice to which they are entitled by law, a multiplicity of actions is avoided, and it is not possible that the rights of innocent parties can be injured thereby. *Sibert* v. *Thorp*, 77 Ill. 43.

An office judgment which stands as such on the docket of the court cannot, under the practice in Virginia, be set aside by plea in abatement. But if the proceedings in the office were grossly irregular, the cause should be remanded. *Wall* v. *Atwell*, 21 Gratt. (Va.) 401.

# CHAPTER II.

## ACCORD AND SATISFACTION.

### ARTICLE I.

#### OF ACCORD AND SATISFACTION IN GENERAL.

**Section 1. Definition and nature.** An accord and satisfaction may be briefly defined as the settlement of a dispute or the satisfaction of a claim, by an executed agreement between the party injuring and the party injured. *Bull* v. *Bull*, 43 Conn. 455. In other words, it is the substitution of another agreement between the parties in satisfaction of the former one, and an execution of the latter agreement. *Pulliam* v. *Taylor*, 50 Miss. 251, 257. If A is indebted to B for an unliquidated amount, or if he is liable to him in an action for any cause, and he promises or agrees to pay B a specified sum, or to deliver him some other ascertained thing which B agrees to accept in satisfaction of his demand, this is an accord, and if the promise is performed by the delivery and acceptance of the thing agreed, this is a satisfaction, and bars any action for the original cause. 1 Wait's L. & Pr. 1036. The principle of an accord and satisfaction is, that a party who has a legal right of action against another may accept of some other legal thing in discharge of his claim or demand, and the agreement to deliver it is the accord, but the actual delivery and acceptance thereof is the satisfaction. And according to a very ancient rule, a mere accord without the requisite satisfaction agreed on is not a bar to an action on a legal claim or demand (Id.; *Heathcote* v. *Crookshanks*, 2 Term R. 24; *Ballard* v. *Noaks*, 2 Ark. 45; *Clark* v. *Bowen*, 22 How. [U. S.] 270; *Rising* v. *Cummings*, 47 Vt. 345; *Piper* v. *Kingsbury*, 48 id. 480; *Phillips* v. *Aflalo*, 4 Man. & Gr. 846); and still less is an *agreement* for an accord. *Smart* v. *Chell*, 7 Dowl. 781.

It is likewise essential to the validity of an accord and satisfaction, that the thing agreed to be done be legal, for if the thing to be done, or the consideration, is illegal, the accord will be void. *Edgecombe* v. *Rodd*, 5 East, 294; *Driesbach* v. *Keller*, 2 Penn. St. 77. So, the matter or thing agreed to be received in satisfaction of a debt or demand must possess some legal value; and it must be something to which the cred-

itor was not before entitled. If the thing given in satisfaction has no legal value whatever, or does not vest in the creditor an interest or right which he had not before, it will not be available as a valid accord and satisfaction. *Davis* v. *Noaks*, 3 J. J. Marsh. (Ky.) 494; *Keeler* v. *Neal*, 2 Watts (Penn.), 424. It is also well settled, that the agreement or accord must be *executed*. *Flack* v. *Garland*, 8 Md. 188, 191; *Hearn* v. *Kiehl*, 38 Penn. St. 147, 149; *Hall* v. *Smith*, 10 Iowa, 45, 48.

§ 2. **What is sufficient.** To constitute an accord and satisfaction, there must be a satisfaction of the entire debt so as completely to extinguish it. *Line* v. *Nelson*, 38 N. J. Law, 358. But where the claim settled is not a money demand, or, if so, is unliquidated, or, if liquidated, is doubtful in fact or law, any sum, no matter how small, given and received in satisfaction of the demand, will legally satisfy it, however large. *Warren* v. *Skinner*, 20 Conn. 559, 562; *McDaniels* v. *Lapham*, 21 Vt. 222; *Donohue* v. *Woodbury*, 6 Cush. 148, 150; *McCall* v. *Nave*, 52 Miss. 494; *United States* v. *Childs*, 12 Wall. 232; *Pierce* v. *Pierce*, 25 Barb. 243; *Brooks* v. *Moore*, 67 id. 393. Thus, if the creditor, in order to avoid a suit on an account, of the result of which he is *doubtful*, agrees to receive any sum in full satisfaction of the amount claimed to be due on the account, and upon such agreement the debtor pays the sum agreed upon, such agreement and payment will completely discharge the debtor from all liability. *Ogborn* v. *Hoffman*, 52 Ind. 439. And even where the claim is a money demand, and liquidated and not doubtful, although it cannot be satisfied with a smaller sum of money, yet if any other personal property is received in satisfaction, it will be good, no matter what the value. *Bull* v. *Bull*, 43 Conn. 455. The court will never, in such cases, inquire into the adequacy of the consideration. Id.; *Fisher* v. *May*, 2 Bibb (Ky.), 449; *Reid* v. *Bartlett*, 19 Pick. 273; *Union Bank* v. *Geary*, 5 Pet. 99, 114. So, an agreement to accept the note of a third person in satisfaction of the claim is a valid consideration, irrespective of its value, and its acceptance is an extinguishment of the debt. *Brassell* v. *Williams*, 51 Ala. 349. See *post*, p. 414, § 6. And where a debtor transfers specific property to trustees for the use of his creditors under a mutual agreement signed by the creditors, whereby they accept the property in full satisfaction and discharge of their several demands, there is a valid accord and satisfaction. *Bartlett* v. *Rogers*, 3 Sawy. (C. C.) 62; *Therasson* v. *Peterson*, 4 Abb. Ct. App. 396; S. C., 2 Keyes, 636. See, also, *Watkinson* v. *Inglesby*, 5 Johns. 386; *McCreary* v. *McCreary*, 5 Gill & J. (Md.) 147; *Murray* v. *Snow*, 37 Iowa, 410. An agreement, by a creditor, with his debtor who is in failing circumstances, to relinquish a por-

tion of his claim in consideration that the debtor will secure the residue, is valid (*Gunn* v. *McAden*, 2 Ired. [N. C.] Eq. 79); and so of an agreement by a creditor to release a portion of his debt, in consideration that the debtor, who was insolvent, would apply the yearly proceeds of his personal labor, in payment of the residue. *Merchants' Bank* v. *Davis*, 3 Ga. 112. And, as a general rule, giving further security for part of a debt or other security, though for a less sum than the debt, and acceptance of it in full of all demands, make a valid accord and satisfaction. *Le Page* v. *McCrea*, 1 Wend. 164; *Boyd* v. *Hitchcock*, 20 Johns. 76.

A receipt and discharge given upon settlement of an account will stand until some specific error is shown (*Robbins, etc., Co.* v. *Brewer*, 48 Me. 481. But see *post*, p. 411, § 3); and a party, who in conformity with the award of arbitrators, which is erroneous, gives or takes a bond for the amount found so to be due, is concluded thereby as to the amount. *Baker* v. *Baker*, 28 N. J. Law, 13. A judgment confessed by one of the partners for the debt of the firm is a satisfaction. *Eckford* v. *DeKay*, 26 Wend. 29; *Frisbie* v. *Larned*, 21 id. 450. So, an accord and satisfaction by one of several obligors in a bond is valid (*Strang* v. *Holmes*, 7 Cow. 224); and an accord and satisfaction of a joint trespass by one is good for all concerned. *Ellis* v. *Bitzer*, 2 Ohio, 89. And see *post*, pp. 417, 418, §§ 9, 10. When two parties have cross actions pending against each other for false imprisonment, and they mutually agree to discontinue such actions, and do so, this will be a good accord and satisfaction. *Foster* v. *Trull*, 12 Johns. 456. And where a plaintiff, after an injury sustained in his person from the tort of the defendent, agrees with the defendant or his agent, that, in satisfaction of such injury, the defendant should pay the expenses incurred by the plaintiff by his detention in consequence of his injury, and should furnish him with a free conveyance to his point of destination, and the defendant performs his part of the agreement, the plaintiff cannot recover further damages for the tort. *Stockton* v. *Frey*, 4 Gill (Md.), 406.

Where a creditor agrees to take certain property of his debtor in satisfaction of his debt upon the faith of representations of the debtor as to its condition, and he takes the property under such agreement after a full opportunity afforded him to test their truth, this will be a good accord and satisfaction of the debt. *Williams* v. *Phelps*, 16 Wis. 80.

§ 3. **What is not sufficient.** There is no objection in law to an agreement by a debtor to pay and by the creditor to accept a sum of money less than that claimed by the creditor in satisfaction of a *dis-*

*puted* balance; and upon payment of such sum by the debtor, the original debt is discharged. *McCall* v. *Nave*, 52 Miss. 494; *Tyler Cotton Press Co.* v. *Chevalier*, 56 Ga. 494; *ante*, p. 409 § 2. But it is deemed to be a reasonably well-settled rule, that, unless the agreement to accept in satisfaction of an *ascertained* debt a sum less than the full amount due be founded on some *additional consideration*, the creditor is not precluded from recovering the rest of his claim. *Evans* v. *Powis*, 1 Exch. 601; *Cooper* v. *Parker*, 14 C. B. 118; 15 id. 822; *Warren* v. *Skinner*, 20 Conn. 557; *Vance* v. *Lukenbill*, 9 B. Monr. (Ky.) 249; *Hayes* v. *Davidson*, 70 N. C. 573; *Mitchell* v. *Sawyer*, 71 id. 70; *Brooks* v. *Moore*, 67 Barb. 394; *Curran* v. *Rummell*, 118 Mass. 482. And it has even been held that where, upon payment of a portion of an undisputed account, the creditor gives a receipt in full, he is not concluded thereby from recovering the balance, although the receipt was given with knowledge, and there was no error or fraud. *Ryan* v. *Ward*, 48 N. Y. (3 Sick.) 204; S. C., 8 Am. Rep. 539; *Harriman* v. *Harriman*, 12 Gray, 341. And see *Bunge* v. *Koop*, 48 N. Y. (3 Sick.) 225; S. C., 8 Am. Rep. 546; *Miller* v. *Coates*, 66 N. Y. (21 Sick.) 609. But in an early New York case, the rule above stated is spoken of as the "rigid and rather unreasonable rule of the old law" (*Johnson* v. *Brannan*, 5 Johns. 268, 272); and again, that it "is technical and not very well supported by reason." *Kellogg* v. *Richards*, 14 Wend. 116. See, also, *Smith* v. *Ballou*, 1 R. I. 497; *Harper* v. *Graham*, 20 Ohio, 105. The rule which obviously may be urged in violation of good faith is not to be extended beyond its precise import, and whenever the technical reason does not exist the rule itself is not to be applied. Hence, the judges have been disposed to take out of its application all those cases where there was any new consideration, or any collateral benefit received by the payee which might raise a technical legal consideration, although it was quite apparent that such consideration was for less than the amount of the sum due. *Brooks* v. *White*, 2 Metc. (Mass.) 283. And see *ante*, p. 409, § 2; *Blinn* v. *Chester*, 5 Day (Conn.), 359, 360. In *Jones* v. *Perkins*, 29 Miss. 139, 141, the payment of the money at a place essentially different from that where the money was agreed to be paid was held sufficient. See *Reed* v. *Hibbard*, 6 Wis. 175, 193. By statute, in Maine, no action can be maintained in that State on a demand which has been canceled by a receipt of any sum of money less than the amount legally due thereon, or for any good and valuable consideration, however small (*Weymouth* v. *Babcock*, 42 Me. 42); but this statute has no application to a part payment with an agreement that the debtor shall have his "own time to pay the balance." *Mayo* v. *Stevens*, 61 id. 562. An agreement by a

creditor to receive less than the amount of his debt if it has been actually executed by the payment of the money, is an accord and satisfaction under the Georgia Code; and this applies to the case of a claim by one person against another for usury paid by the former to the latter. *Rogers* v. *Ball*, 54 Ga. 15. But, a mere deduction, made by a creditor at the time a debt is settled, of a part of the usury included in it, does not amount to an accord and satisfaction, even though it be agreed by the parties that the deduction is to be in satisfaction of the borrower's rights founded on the usury. Id. See *Schrœppel* v. *Corning*, 5 Denio, 236; *Patterson* v. *Birdsall*, 64 N. Y. (19 Sick.) 294; S. C., 21 Am. Rep. 609.

It has been held that the payment and acceptance of a less sum in satisfaction of a greater one due does not discharge the debt, even when made under a parol agreement by the creditor, to accept such sum in satisfaction, if the debtor would procure the loan of it from his friends, and they lent it to him on the faith of such agreement. *Bunge* v. *Koop*, 5 Robt. (N. Y.) 1; S. C. affirmed, 48 N. Y. (3 Sick.) 225; S. C., 8 Am. Rep. 546, *Harriman* v. *Harriman*, 12 Gray, 341. An accord and satisfaction obtained by the fraud and misrepresentation of the debtor is void. *Stafford* v. *Bacon*, 1 Hill, 532; *Baker* v. *Spencer*, 58 Barb. 248; S. C. affirmed, 47 N. Y. (2 Sick.) 562. So of an accord and satisfaction which is obtained by means of duress. *Rourke* v. *Story*, 4 E. D. Smith (N. Y.), 54. And receiving part payment, under protest though tendered in full, is not an accord and satisfaction. *People* v. *Supervisors of Cortland*, 40 How. (N. Y.) 53; S. C., 58 Barb. 139. Nor is a plea of accord and satisfaction supported by proof of a tender made to the plaintiff's attorney who declined to accept it as a satisfaction. *Hammond* v. *Christie*, 5 Robt. (N. Y.) 160; S. C. affirmed, 51 N. Y. (6 Sick.) 270.

§ 4. **Accord without satisfaction.** Where an accord is relied on, it must be executed. *Flack* v. *Garland*, 8 Md. 184, 191; *Hearn* v. *Kiehl*, 38 Penn. St. 147, 149. The plea must allege that the matter was *accepted* in satisfaction. *Maze* v. *Miller*, 1 Washb. (C. C.) 328; *Cushing* v. *Wyman*, 44 Me. 121; *Blackburn* v. *Ormsby*, 41 Penn. St. 97. Thus if the accord be to pay money in satisfaction, it will not operate as a defense until payment is actually made; and proof of readiness to pay, or even of a tender and refusal, is not sufficient. *Smith* v. *Keels*, 15 Rich. (S. C.) 318; *Frost* v. *Johnson*, 8 Ohio, 393; *Noe* v. *Christie* 51 N. Y. (6 Sick.) 270; *Simmons* v. *Clark*, 56 Ill. 96. A plea of accord and tender is bad upon demurrer. *Russell* v. *Lytle*, 6 Wend. 390. But proof of delivery to, and *acceptance* by, even an agent of the creditor, or one whose act is afterward ratified, will sustain the plea

of accord and satisfaction. *Evans* v. *Wells*, 22 id. 325; *Eaton* v. *Lincoln*, 13 Mass. 424. And if a judgment be given to a trustee for satisfaction of a creditor, and the creditor affirm the arrangement by proceeding on the judgment, this is an acceptance, and the plea of accord and satisfaction will be good. *Seaman* v. *Haskins*, 2 Johns. Cas. 195; 1 Sm. Lead. Cas. (7th Am. ed.) 606.

§ 5. **New or substituted agreement.** Although, as seen in the preceding section, the common law declares that without a satisfaction an accord is no bar to a suit upon the original obligation, yet if the accord is founded upon a new consideration and accepted as satisfaction, it operates as such satisfaction, and will be held to take away the remedy upon the old contract. *Hall* v. *Smith*, 15 Iowa, 584; *Griffith* v. *Owen*, 13 M. & W. 63; *Good* v. *Cheeseman*, 2 B. & Ad. 328; *Babcock* v. *Hawkins*, 23 Vt. 561. A distinction is made in the law of accord and satisfaction, between an engagement to accept a promise in satisfaction, and an agreement requiring *performance* of the promise. If the promise itself and not its performance is accepted in satisfaction, this is a good accord and satisfaction without performance. But if the parties contemplate that performance of the contract shall be a discharge of the demand, the mere agreement does not constitute an accord and satisfaction, but performance is necessary to complete it. *Whitney* v. *Cook*, 53 Miss. 551; *Molyneaux* v. *Collier*, 13 Ga. 406. An accord unperformed, consisting of mutual promises and thus having a new consideration, is binding upon the parties, although unperformed, and an action will lie for a breach of it. *Billings* v. *Vanderbeck*, 23 Barb. 546. And see *Goodrich* v. *Stanley*, 24 Conn. 613.

But where one promise or agreement is set up in satisfaction of another, the rule is that an agreement or promise of the same grade will not be held to be in satisfaction of a prior one, unless it has been *expressly accepted* as such; but where a new promissory note has been given in lieu of a former one, to have the effect of a satisfaction of the former, it must have been secured on an express agreement to that effect. *Pulliam* v. *Taylor*, 50 Miss. 251. In such cases, therefore, the question depends on the intention of the parties as manifested by the exact circumstances of each case. *Babcock* v. *Hawkins*, 23 Vt. 561. And see *Wiseman* v. *Lyman*, 7 Mass. 286; *Sard* v. *Rhodes*, 1 M. & W. 153; *Vedder* v. *Vedder*, 1 Denio, 257.

Where a debtor, merely for the purpose of *securing* a part of the note and not by way of substitution for it, gives a mortgage on his own estate alone, it is a mere accord, and no more, and does not operate as a satisfaction of the original debt. *Platts* v. *Walrath*, Hill & Denio (N. Y.), 59. There may be an accord and

satisfaction of an official bond by the substitution and acceptance of a new bond in its place. *Rush* v. *Soutter*, 67 Barb. 371.

§ 6. **By receipt of negotiable securities.** It is a well-settled doctrine that a negotiable promissory note will not affect the discharge of a pre-existing debt, unless there be an express agreement to receive it in payment thereof (*Jaffrey* v. *Cornish*, 10 N. H. 505); but by express agreement it may be a satisfaction and a bar. *Sibree* v. *Tripp*, 15 M. & W. 23; *Weakley* v. *Bell*, 9 Watts, 273; *Dougal* v. *Cowles*, 5 Day (Conn.), 511; *Johnson* v. *Johnson*, 11 Mass. 359. It is, however, the settled doctrine in New York that a promissory note or bill of the debtor, though accepted by the creditor in full satisfaction, is not and cannot in law be a discharge of the debt so as to bar the original cause of action. *Putnam* v. *Lewis*, 8 Johns. 389; *Frisbee* v. *Larned*, 21 Wend. 450; *Conkling* v. *King*, 10 Barb. 372; S. C. affirmed, 10 N. Y. (6 Seld.) 440. But see *Myers* v. *Wells*, 5 Hill, 463.

The cases in which a new note is given in substitution of a former note are attended with less difficulty. These transactions, of renewing debts by new notes, are equivalent to paying the existing debt, and again borrowing the money. Vol. 1, p. 570. *Castleman* v. *Holmes*, 4 J. J. Marsh. (Ky.) 1. And see *Bank of United States* v. *Daniel*, 12 Pet. 32; *Slaymaker* v. *Gundacker*, 10 Serg. & R. 75. Still, even in these cases, the decision of the court is regulated exclusively by the intention of the parties and the justice of the case. And where the former note is paid and discharged by the new discount, it is not to be pleaded as an accord and satisfaction, but as a *payment*. *Letcher* v. *Bank of Commonwealth*, 1 Dana (Ky.), 82; 3 J. J. Marsh. 195; 1 Sm. Lead. Cas. (2d Am. ed.) 618, 619.

Where a debtor gives his note, *indorsed* by a third person, as further security, for a part of the debt, which is accepted by the creditor, in full satisfaction of all demands, it is a valid discharge of the whole debt, and it may be pleaded in bar, as an accord and satisfaction. *Boyd* v. *Hitchcock*, 20 Johns. 76. So, in general, if a creditor compounds with his debtor, and agrees to take less than the whole debt, and accepts the bond or promissory note of his debtor with security, or the note of a third person, the new and additional security furnishes a sufficient consideration for a relinquishment of the excess, and the accord and satisfaction are complete. *Pulliam* v. *Taylor*, 50 Miss. 251; *Brasell* v. *Williams*, 51 Ala. 349; *McIntyre* v. *Kennedy*, 29 Penn. St. 448, 454; *Glenn* v. *Smith*, 2 Gill & J. (Md.) 494; *Gordon* v. *Price*, 10 Ired. (N. C.) 385; *Maze* v. *Miller*, 1 Wash. (C. C.) 328; *Pardee* v. *Wood*, 8 Hun (N. Y.), 584. And if the acceptance by the creditor of the note of a third person for a part of the original debt is a discharge of the whole, it must

necessarily operate as an extinguishment of the original consideration, where such note is given for the *whole amount due*, and is accepted in full satisfaction of it. *Booth* v. *Smith*, 3 Wend. 66. And the fact, that the debt meant to be affected by the receipt of the assigned note is a judgment debt, is not important. *State Bank* v. *Fletcher*, 5 id. 85; *Jones* v. *Ransom*, 3 Ind. 327; *Sanders* v. *Branch Bank at Decatur*, 13 Ala. 353.

Where the assignee of a promissory note joins with the other creditors of the maker, in a composition agreement between such maker and his creditors, by which the former agrees to surrender his property to his creditors, and they, in consideration thereof, agree to accept such surrender in full satisfaction of their claims, and the agreement is performed on the part of such debtor, such assignee cannot afterward recover on such note from his assignor. *Pontions* v *Durflinger*, 59 Ind. 27.

The case of the acceptance of a note of one partner for a liability of the firm appears to be considered the same as the acceptance of the note of a third person. And a distinct agreement by a creditor, upon a dissolution of a partnership, to accept the notes of the member or members continuing in business, in discharge of the retiring members, is a valid discharge of them, and may be pleaded in bar of an action brought against them. *Sheehy* v. *Mandeville*, 6 Cranch, 253; 1 Sm. Lead. Cas. (2d Am. ed.) 614. And see *Harris* v. *Lindsay*, 4 Wash. (C. C.) 271; *Parker* v. *Cousins*, 2 Gratt. (Va.) 373; *Livingston* v. *Radcliff*, 6 Barb. 202; *Kinsler* v. *Pope*, 5 Strobh. (S. C.) 126; *Beam* v. *Barnum*, 21 Conn. 200.

If one party furnishes another money, and such other gives him his note therefor, with the understanding that the payor shall procure third parties to assign to himself certain liens on land claimed by the payee, which liens the payor shall hold for the benefit of the payee, in satisfaction of the note, the agreement amounts to an accord and satisfaction, and is a payment of the note. *Treadwell* v. *Himmelmann*, 50 Cal. 9. And see *Hagood* v. *Swords*, 2 Bail. (S. C.) 305.

So, where a debtor settles the amount due from him to his creditor, upon notes and drafts, by giving him in full satisfaction of the claim a draft on a third person for fifty per cent of the amount, payable in gold, which is subsequently paid, and the creditor accepts such draft, and surrenders and cancels the evidences of the indebtedness, this is a good accord and satisfaction. *Stagg* v. *Alexander*, 55 Barb. 70.

But in a recent case in Massachusetts, the buyer, in order to pay for a bill of goods, sent to the seller the check of a third person on a fourth, and the seller, on receiving it, sent back a receipt for the amount of it,

as received in settlement of the bill. At the time of sending the check the buyer supposed it to be good, but when the seller, within a reasonable time, presented it to the drawee, it was dishonored; and it was held that there was no accord and satisfaction of the original debt. *Weddigen* v. *Boston Elastic Fabric Company*, 100 Mass. 422. So, if a third person, whose note is taken for a debt, is an infant, and successfully defends on the ground of infancy, there is no satisfaction. *Wentworth* v. *Wentworth*, 5 N. H. 410.

Where a creditor claims a larger sum to be due him than the debtor admits, but takes a promissory note from the debtor for a smaller amount, he will be bound by the settlement. *Powell* v. *Jones*, 44 Barb. 521. And see *ante*, p. 409, § 2. It has likewise been held, that if a creditor receive from his debtor, in satisfaction of his claim, a note for a less sum, signed by the debtor and his wife, which all the parties at the time suppose is binding upon her, and such note is afterward paid out of her separate property, it will constitute a valid discharge of the original debt. *Bowker* v. *Harris*, 30 Vt. 424.

§ 7. **By allowing cross demands.** Where two parties have cross actions pending against each other, as, for false imprisonment, and they mutually agree to discontinue such action and do so, this will be a good accord and satisfaction. *Foster* v. *Trull*, 12 Johns. 456. So where A and B have cross suits for trespass pending against each other, and B exacts and receives a receipt in full of all demands, upon a settlement of his cause of action against A, the receipt extends to A's cause of action and it is extinguished by it. *Vedder* v. *Vedder*, 1 Denio, 257. See, also, *Smith* v. *Page*, 15 M. & W. 683; *Callander* v. *Howard*, 10 C. B. 290.

§ 8. **For personal injuries.** It is well settled that in actions for general and unliquidated damages, the payment and acceptance of a sum of money, as a satisfaction, is a good bar; and this defense has been frequently interposed to actions brought to recover damages for personal injuries. Thus, in an action for injuries arising from a concussion caused by a collision of railway trains, the plaintiff having, the day after the occurrence, agreed in terms to accept a sum in satisfaction of the injuries, and all consequences arising therefrom, it was held, that if his mind went with those terms, and he understood their effect when he assented to them, he was bound by the agreement, and could recover no further compensation, even though it appeared that he had sustained serious and permanent injuries, latent and undiscovered until some time afterward, and of which he had no idea at the time he entered into the arrangement. *Rideal* v. *Great Western Railway Co.*, 1 F. & F. 706. And see *Stockton* v. *Frey*, 4 Gill (Md.), 406. So, a written

agreement of the plaintiff, acknowledging the receipt, in satisfaction of the assault and battery sued for, of the promissory note of the defendant for a certain sum, payable in three and twelve months, was held to be a good plea of accord and satisfaction. *Peace* v. *Stennet*, 4 J. J. Marsh.(Ky.) 449. So, a receipt for a sum of money, "in full for damages done us by a stage accident," etc., signed by the party injured, is *prima facie* evidence of an accord and satisfaction, and in the absence of fraud in obtaining it, cannot be varied by parol evidence. *Coon* v. *Knap*, 8 N. Y. (4 Seld.) 402. See *Ludington* v. *Miller*, 6 Jones & Sp. 478. Where A made a criminal charge against B, upon which an action for slander was brought, and it was agreed that A should write to C in exculpation of B, in full satisfaction of the matter, and he did so, this was held to constitute a good accord and satisfaction of any claim against B. *Smith* v. *Kerr*, 1 Barb. 155.

On the other hand, in an action for an injury sustained through a railway accident, the plaintiff, at the time, not supposing that he had sustained any serious injury, accepted of the company a trifling sum as compensation for damage to his clothing, and it was held that the receipt of this sum could not be set up as an accord and satisfaction for a patent and severe injury to the brain or spine. *Roberts* v. *Eastern Counties Railway Co.*, 1 F. & F. 460.

Nor is it a defense to an action brought by the father, to recover damages for the seduction of his daughter, that an allowance was made to the daughter under the bastardy laws, for the support and maintenance of the bastard child. They are two separate and distinct things, and the one cannot be used as an accord and satisfaction, or bar to an action justly arising under the other. *Sellars* v. *Kinder*, 1 Head (Tenn.), 134.

§ 9. **By co-contractors or covenantors.** The doctrine appears to be well settled at common law, that the release of one or more of several joint obligors operates as a release of all, and the holder of the bond or note is barred of his right of action, and recovery, against the other co-obligors. The debt being extinguished as to one, it discharges all, whether the parties intend it or not. *Evans* v. *Pigg*, 3 Coldw. (Tenn.) 395; *Dufresne* v. *Hutchinson*, 3 Taunt. 117. In other words, an accord and satisfaction by one of several joint obligors is valid. *Strang* v. *Holmes*, 7 Cow. 224. But the accord and satisfaction must in every case be complete, entire, and fully executed (*Rayne* v. *Orton*, Cro. Eliz. 305); and it will not avail if it be only a settlement with one of the plaintiffs, or one of the defendants, for his share of the damages. *Clark* v. *Dinsmore*, 5 N. H. 136. And see *Ayrey* v. *Davenport*, 2 New R. 474. And where one of three joint covenantors

gave a bill of exchange for part of a debt secured by a covenant, on which bill judgment was recovered, it was held that such judgment was no bar to an action of covenant against the three, such bill not being averred to have been accepted in satisfaction, nor to have produced it in fact. *Drake* v. *Mitchell*, 3 East, 251.

To an action brought by three on a joint demand, the defendant pleaded satisfaction with one of them, by part payment in cash, and a set-off of a debt due from that one to the defendant, and this was held to be a good plea, without alleging any authority from the other two to make the settlement. *Wallace* v. *Kelsall*, 7 Mees. & W. 264; S. C., 8 D. P. C. 841.

Satisfaction of a bill as between drawer or indorser and indorsee, whether made before or after the bill becomes due, does not necessarily inure as a satisfaction on behalf of the acceptor, or operate to discharge him from liability to the indorsee, for the reason that the contracts created by the bills as between the drawer and acceptor, and the indorsee, are essentially distinct. *Jones* v. *Broadhurst*, 9 C. B. 173. See *Harrison* v. *Close*, 2 Johns. 448.

§ 10. **By co-trespassers.** It a is well-settled principle that a satisfaction of damages from one, the action being joint, will operate as a discharge of all, whether the parties intended it or not in actions against wrong-doers for torts. *Brown* v. *Kencheloe*, 3 Cold. (Tenn.) 192; *Strang* v. *Holmes*, 7 Cow. 224; *Ruble* v. *Turner*, 2 Hen. & M. (Va.) 38. An accord and satisfaction of a joint trespass by one is good for all concerned. The act of one of several joint trespassers is the act of all, they all unite to do an unlawful act, and each is responsible for the acts of the others. The plaintiff may elect to sue them jointly or separately, and may pursue them until he has obtained satisfaction, but he can have but one recompense in damages for the same injury. *Ellis* v. *Bitzer*, 2 Ohio, 89. A partial satisfaction by one of several wrong-doers is a satisfaction *pro tanto*, as to all. *Merchants' Bank* v. *Curtiss*, 37 Barb. 317.

It is held to be a good defense in an action for a trespass, committed by the defendant as a servant, and at the command of his master, that satisfaction was accepted by the plaintiff from the master. *Thurman* v. *Wild*, 11 Ad. & El. 453; S. C., 3 P. & D. 489.

§ 11. **By strangers.** A rule generally recognized by the courts is, that the matter received in satisfaction must be given by the debtor, and not by a stranger. *Edgecomb* v. *Rodd*, 5 East, 294; *Lucas* v. *Wilkinson*, 1 Hurl. & N. 420; *Clow* v. *Borst*, 6 Johns. 37; *Blum* v. *Hartman*, 3 Daly (N. Y.), 47; *Stark* v. *Thompson*, 3 T. B. Monr. (Ky.) 296. A voluntary payment of another's debt by a stranger will give

no right of action in the name of the payor against the debtor, nor will a mere advancement by a stranger of the sum due bar the right of action by the original creditor, or defeat a suit prosecuted in his name, and with his consent by the payer. *Brown* v. *Inhabitants of Chesterville*, 63 Me. 241. See, also, *Ingraham* v. *Gilbert*, 20 Barb. 151. But the rule as above stated does not apply to an action against an agent for a trespass or other act done by the command of the principal, since the relation between them is such that a consideration moving from one may well inure to the benefit of the other. *Thurman* v. *Wild*, 11 Ad. & El. 453; S. C., 3 P. & D. 489. So, if satisfaction is made by a stranger at the *defendant's request*, and it is *accepted* by the plaintiff, this will constitute a valid accord and satisfaction. *Rusk* v. *Soutter*, 67 Barb. 371, 372, 373. And there are cases in which a previous request may not be necessary, for if a person makes the advance as the professed agent of the defendant, although he had no authority at the time, and the satisfaction is accepted by the plaintiff, this will bar his action if the defendant subsequently ratifies the unauthorized act of such assumed agent, and the ratification will be sufficient if made at the trial of the action. *Simpson* v. *Eggington*, 10 Exch. 845. And see *Belshaw* v. *Bush*, 11 C. B. 191. In an early case in Alabama, it was held that an accord and satisfaction, coming from a third person, and accepted by the plaintiff in discharge of the defendants' liability, is a bar of an action. *Smith* v. *Wyser*, 1 Stew. (Ala.) 184. So, in Ohio an accord and satisfaction, moving from a stranger or person having no pecuniary interest in the subject-matter if accepted in discharge of the debt, constitutes a good defense to an action to enforce the liability against the debtor. *Tappan* v. *Tappan*, 6 Ohio St. 64, 71.

§ 12. **By part payment.** We have seen *ante*, p. 411, § 3, that, as a general rule, a payment of less than the whole of an *undisputed* debt, already payable, is not a satisfaction of the balance even though agreed to be received in full of the whole debt. To render the release of the balance obligatory, there must be something in the transaction which can be treated as a new consideration. See, also, *Daniels* v. *Hatch*, 21 N. J. Law, 391; *Bowe* v. *Gano*, 9 Hun (N. Y.), 6; *Warren* v. *Skinner*, 20 Conn. 559; *Pearson* v. *Thomason*, 15 Ala. 700; *Higgins* v. *Halligan*, 46 Ill. 173. But where, by a mode or time of part payment variant from that provided for in the contract, a new benefit is or may be conferred, or burden imposed, a new consideration arises out of the transaction, and gives validity to the agreement of the creditor. *Rose* v. *Hall*, 26 Conn. 392. See *ante*, p. 409, § 2. Thus, it is held that payment of less than the whole debt, if made before it is due, or at a

different place from that stipulated it received in full, is a good satisfaction. *Jones* v. *Bullitt*, 2 Litt. (Ky.) 49; *Ricketts* v. *Hall*, 2 Bush (Ky.), 249; *Smith* v. *Brown*, 3 Hawks. (N. C.) 580; *Jones* v. *Perkins*, 29 Miss. 139, 141. And so, if a payment is made in the notes of a third person (*Goodnow* v. *Smith*, 18 Pick. 414; *ante*, p. 414, § 6); so, the procurement of a written agreement from one probably liable on the default of the defendant, that he will take no advantage of the discharge of the defendant, is a good consideration to make part payment a satisfaction. *Booth* v. *Campbell*, 15 Md. 569. And it has been held that, in the absence of fraud, an acceptance by the creditor of a third person's deed of all his title in certain land may be a good consideration to sustain an agreement to take a part for the whole debt although the title fails. *Reed* v. *Bartlett*, 19 Pick. 273. And see *Keeler* v. *Salisbury*, 33 N. Y. (6 Tiff.) 648. So, an agreement on the part of a judgment creditor to receive from the judgment debtor an eastern draft for a less sum in full satisfaction and discharge of the judgment being executed by the delivery and aceptance of the draft was held to be valid as an accord and satisfaction. *Reid* v. *Hibbard*, 6 Wis. 175.

The rule that payment of less than the whole debt is not satisfaction should not be applied where the payment which was accepted in satisfaction exceeded the principal, and only fell short in the calculation of interest. The question as to interest depends much on the circumstances of the settlement, and its computation is not always precise. *Johnston* v. *Brannan*, 5 Johns. 268. And see *Tenth Nat. Bank* v. *Mayor of New York*, 4 Hun (N. Y.), 429. And it is to be observed in accordance with the doctrine laid down in a preceding section (*ante*, p. 409, § 2), that the rule does not apply to any cases except where the plaintiff's claim is for a fixed and liquidated amount, or where the sum due could be ascertained by mere arithmetical calculation. *McDaniels* v. *Lapham*, 21 Vt. 222; *Mathis* v. *Bryson*, 4 Jones' (N. C.) L. 508. The doctrine briefly summed up is, that if the demand to be satisfied is a definite sum of money, and the sum to be paid in satisfaction also money, the satisfaction must equal the claim; but if the claim is for unliquidated damages, or the thing done or given is not money, the question of adequacy does not arise. It is enough that something substantial, which one party is not bound by law to do, is done by him, or something which he has a right to do, he abstains from doing at the request of the other party. *Watson* v. *Elliott*, 57 N. H. 511, 513; *Bull* v. *Bull*, 43 Conn. 455.

§ 13. **Acceptance.** To constitute a good accord and satisfaction, it must be *accepted* as such. *Barnes* v. *Lloyd*, 2 Miss. 584. See *ante*, pp.

412, 413, §§ 4, 5. A mere readiness to perform the accord, or a tender of performance, will not suffice. Thus, it was held not a good plea of accord and satisfaction that the plaintiff agreed to accept the note of a third person in discharge of the demand in suit, which, on being tendered him, he refused to accept. *Hawley* v. *Foote*, 19 Wend. 516. So, after the maturity of an accepted draft, the holder agreed under seal with the acceptor, to take less than the face of the draft if paid within a specified time, and to transfer the draft to a third party. A *tender* of the sum agreed to be taken was made within the specified time, but this was held to constitute no defense to an action on the draft. *Young* v. *Jones*, 64 Me. 563; S. C., 18 Am. Rep. 279. See, also, *Breckenridge* v. *Ormsby*, 1 J. J. Marsh. (Ky.) 236; *Hearn* v. *Kiehl*, 38 Penn. St. 147. Acceptance by a ward after he is of age, of promissory notes, which the guardian had not collected and was therefore liable to pay, is not a good plea to an action on the guardian's bond unless they are collected. *Commonwealth* v. *Miller*, 5 T. B. Monr. (Ky.) 205. Saying "it is not enough, but there will be no trouble" at the time of the payment of a claim, is not an acceptance in full satisfaction. *Willey* v. *Warden*, 27 Vt. 655. In an action in form *ex delicto*, if one of several plaintiffs accepts a sum of money in satisfaction of his part of the damages, such accord and satisfaction is no answer to the action. *Clark* v. *Dinsmore*, 5 N. H. 136. See *ante*, p. 418, § 10. So acceptance of a dividend under a voluntary assignment made by the debtor without his creditors' concurrence, and without an agreement to accept the assignment in satisfaction of the debt, is no bar to an action for the balance. *Allen* v. *Roosevelt*, 14 Wend. 100. The acceptance by a bailor from the bailee of a part payment, and of the bailee's notes for the residue of the value, is not, the notes being unpaid, an accord and satisfaction which waives the bailor's right to arrest (*Person* v. *Civer*, 29 How. [N. Y.] 432); and a right of action by the owner of a chattel for injuries done to it in the possession of a bailee is not barred by a settlement between the owner and the bailee. *Rindge* v. *Coleraine*, 11 Gray, 157.

§ 14. **By delivery of property.** We have seen (*ante*, p. 409, § 2), that acceptance of a collateral thing, if of any legal value in satisfaction of a pre-existing debt, is a good accord and satisfaction. And it is held that an agreement to accept a thing in satisfaction is sufficiently executed by a delivery to any person appointed by the party to receive it. *Anderson* v. *Highland Turnpike Co.*, 16 Johns. 86. An act done by, or to, the agent of a party, of a matter resting *in pais*, is equivalent to its being done by, or to the principal. Id. See *Grocers' Bank of New York* v. *Fitch*, 1 N. Y. Sup. Ct. (T. & C.) 651, 655; S. C. affirmed, 53

N. Y. (13 Sick.) 623. But unless a plea of accord and satisfaction by the delivery of certain property to the plaintiff states a time when the delivery was made, it is bad on special demurrer. *Pence* v. *Smack*, 2 Blackf. (Ind.) 315. See, also, *State Bank* v. *Littlejohn*, 1 Dev. & Bat. (N. C.) L. 563, 565.

§ 15. **When set aside.** A mutual mistake of fact will authorize a court to open and correct an accord and satisfaction. *Calkins* v. *Griswold*, 11 Hun (N. Y.), 208. In a recent English case, a passenger, injured by a railway accident, sent in a claim for £691 against the railway company as compensation, but he accepted £400 and gave a receipt acknowledging it to be in full discharge of his claim. Afterward he commenced an action against the company for further compensation, to which the company pleaded the plaintiff's acceptance of the latter sum in full satisfaction and discharge of the causes of action. The plaintiff filed his bill to restrain them from relying on the plea, and from setting up the acceptance or the receipt as a satisfaction or discharge of the damages, except to the extent of £400. The bill did not allege fraud, but that the plaintiff had signed the receipt on the express condition that he should not thereby exclude himself from further compensation if his injuries turned out more serious than was supposed at the time. It was held that as the statement in the receipt could be rebutted by evidence that the plaintiff did not receive the money in full satisfaction of all demands, the whole case could be tried at law better than in equity, and that the bill ought to be dismissed. *Lee* v. *Lancashire, etc., Railway Co.*, L. R., 6 Ch. App. 527. See 2 DeG. J. & S. 319; *ante*, p. 416, § 8.

§ 16. **Pleading the defense.** Accord and satisfaction must be specially pleaded in an action of trespass, and cannot be given in evidence under the general issue. *Kenyon* v. *Sutherland*, 3 Gilm. (Ill.) 99. But evidence of accord and satisfaction is admissible in assumpsit under the general issue. *Burge* v. *Dishman*, 5 Blackf. (Ind.) 272.

Accord and satisfaction is a good bar to an action of covenant where the breach of covenant has accrued (*Blake's Case*, 6 Co. 43); but not where the breach has not accrued. *May* v. *Taylor*, 6 Man. & Gr. 262, note *a*; *Harper* v. *Hampton*, 1 Harr. & J. (Md.) 622, 673; *Smith* v. *Brown*, 3 Hawks (N. C.), 580. So accord and satisfaction may be pleaded in bar of a writ of error (*Salmon* v. *Pixlee*, 2 Day [Conn.], 242. But see *Potter* v. *Smith*, 14 Johns. 444, and *Clowes* v. *Dickenson*, 8 Cow. 328, where the last case was doubted); but not to an action on a judgment. *Riley* v. *Riley*, 20 N. J. Law, 114.

The general rule is, that an accord and satisfaction is not a good

plea, unless the accord be of as high a nature as the obligation. *McCormick* v. *Oliver*, 7 Yerg. (Tenn.) 24.

§ 17. **Proof of.** A parol agreement cannot be received in evidence to prove a plea of accord and satisfaction, to an action of debt on bond. *State Bank* v. *Littlejohn*, 1 Dev. & B. (N. C.) L. 563. Thus, a parol agreement to release an action for a personal injury in consideration of the surrender of the bond, is not a good plea as an accord and satisfaction, to an action on a bond for money. *McCormick* v. *Oliver*, 7 Yerg. (Tenn.) 24.

So, in an action of covenant, the plea of accord and satisfaction is not supported by evidence of the rescission of the covenant. *Barrelli* v. *O'Conner*, 6 Ala. 617. And see *West* v. *Blakeway*, 2 Man. & Gr. 729.

The lapse of twenty years after damage sustained by the breach of a covenant against incumbrances on land was held *prima facie* sufficient to support a plea of accord and satisfaction to an action on the covenant. *Jenkins* v. *Hopkins*, 9 Pick. 543. But the lapse of twenty years from the time of making a contract to be performed *in futuro* is not of itself evidence of a new contract averred to have been performed, and pleaded as an accord and satisfaction of the original contract. *Siboni* v. *Kirkman*, 1 Mees. & W. 418.

A receipt acknowledging the payment of a particular sum, but not stating it to be in full, will not support the plea of accord and satisfaction (*McCullen* v. *Hood*, 3 Dev. [N. C.] L. 219); and an entry in a suit, that the costs are to be paid by the defendant, is not even *prima facie* evidence to be left to a jury of an accord and satisfaction. *Bond* v. *McNider*, 3 Ired. 440. But where an agreement was made at the time of the execution of a note payable in money, that it should be paid in labor, and the labor was accordingly performed, it was held in an action on the note that these facts sustained the plea of accord and satisfaction. *Blinn* v. *Chester*, 5 Day (Conn.), 359.

Giving a promissory note is held to be presumptive evidence of a settlement of all prior accounts (*Bishop* v. *Welsh*, 35 Ind. 521); but it is not conclusive. Id. See *ante*, p. 414, § 6.

# CHAPTER III.

## ACCOUNT STATED.

### ARTICLE I.

#### OF ACCOUNT STATED IN GENERAL.

**Section 1. Definition and nature.** A stated account is an agreement between both parties that all the articles are true, but this agreement may be implied from circumstances; as where merchants reside in different countries, and one sends an account to the other, who makes no objection to it within a reasonable time. *Stebbins* v. *Niles*, 25 Miss. 267. And see Vol. 1, pp. 191–198. It is not necessary that the account should be signed by the parties, in order to render it a stated account; for it will be sufficient that it has been examined and accepted by both of them. *Lockwood* v. *Thorne*, 11 N. Y. (1 Kern.) 170. And see Wait's Law & Pr. 719.

In stating an account, two things are necessary: 1st, that there be a mutual examination of the claims of each other by the parties; and 2d, that there be a mutual agreement between them, as to the correctness of the allowance and disallowance of the respective claims, and of the balance, as it is struck upon the final adjustment of the whole account and demands on both sides. The minds of the parties must meet upon the allowance of each item or claim allowed, and upon the disallowance of each item or claim rejected. They must mutually concur upon the final adjustment, and nothing short of this in substance will fix and adjust their respective demands as an account stated. *Lockwood* v. *Thorne*, 18 N. Y. (4 Smith) 286.

The nature of an account stated is that the parties consider the claims, and strike a balance, after which the vouchers may be destroyed, and the balance may not be disputed. It is an agreement by both parties that the items are true. The consideration of the promise is the stating of the account. To prove the items is not necessary, as the action is not upon them, but upon the defendant's consent to the balance ascertained. It exists only where the accounts have been examined, and the balance admitted as the true balance between the parties. *Reinhardt* v. *Hines*, 51 Miss. 344. See *Stenton* v. *Jerome*, 54 N. Y. (9 Sick.) 480. The

consent of the parties to the balance claimed is what imparts to an account the character of an account stated. The acknowledgment by the debtor that a certain sum is due creates an implied promise to pay; and in an action upon an account stated it is not necessary to set forth the subject-matter of the original debt. *Foster* v. *Allanson*, 2 Term R. 480; *Fitch* v. *Leitch*, 11 Leigh (Va.), 471; *Hoyt* v. *Wilkinson*, 10 Pick. 31; *Tassey* v. *Church*, 4 Watts & Serg. 141. On the other hand, the ordinary *indebitatus* count gives no warning that evidence will be offered to prove an account stated; and under such a count evidence of an account stated is not admissible, although it is generally true that the same evidence which establishes an account stated when the subject-matter is the sale of merchandise will also authorize a recovery in *indebitatus assumpsit*. *So, held*, where, under a plea of the statute of limitations, the action on open account could not be sustained, but an account stated was not yet barred by the statute. *McCall* v. *Nave*, 52 Miss. 494.

A plaintiff cannot, on the trial, rely upon written statements or accounts made out and rendered by the defendant as constituting an account stated, unless he has declared upon them as an account stated. If his complaint sets forth the original transactions as the ground of his action, and not the account stated, either party may show what the original transactions were. *Northern Line Packet Co.* v. *Platt*, 22 Minn. 413.

An action upon an account stated can never be maintained, where one of the parties never assented to the balance claimed by the other to be found due. *Cape Girardeau, etc., R. R. Co.* v. *Kimmel*, 58 Mo. 83. See, also, *Porter* v. *Cooper*, 1 Cr. M. & R. 387; S. C., 4 Tyr. 264.

§ 2. **What amounts to.** Generally, in equity, an account current, rendered by one merchant to another, and received and held without objection, will be deemed a stated account. Objection to such account rendered, to prevent it from becoming an account stated, must be made within a reasonable time, and the party contesting the account so rendered is the one to prove that he made objection within a reasonable time. *Ruffner* v. *Hewitt*, 7 W. Va. 585; *Avery* v. *Leach*, 9 Hun (N. Y.), 106; *Coopwood* v. *Bolton*, 26 Miss. (4 Cush.) 212; *Darlington* v. *Taylor*, 3 Grant (Penn.), 195; *Terry* v. *Sickles*, 13 Cal. 427; *Mansell* v. *Payne*, 18 La. Ann. 124. Yet, what will amount to an account stated from presumed acquiescence of parties must depend upon the special circumstances of each case. *White* v. *Hampton*, 10 Iowa, 238. An account presented by a creditor, to a party indebted, and corrected by the parties, is an account stated, and binding upon the representa-

tives of the debtor, as to items not objected to by the decedent. *Sergeant* v. *Ewing*, 36 Penn. St. 156. An account including items of compound interest, made out and signed by the debtor, purporting to be a statement of "accounts liquidated and settled," cannot be enforced as an agreement to pay the amount stated as due, including such items of compound interest. *Young* v. *Hill*, 67 N. Y. (22 Sick.) 162; 23 Am. Rep. 99; reversing S. C., 6 Hun (N. Y.), 613.

To constitute an account stated, it is not necessary that there should be mutual, or cross-demands. They may be all on one side, or consist of charges and the acknowledgment of payment. The simple rendering of the items of an account between the parties, and the striking of a balance, or agreeing upon the amount due, is sufficient; and upon such a state of facts, an action on an account stated may be maintained. Where the plaintiff went over the account in the defendant's presence, and found a certain sum due to the plaintiff, and the result was not objected to by the defendant, it was held to be an account stated, which would be conclusive upon both parties, unless there had been mutual compromises which operate as an estoppel *in pais*, but otherwise open to impeachment for fraud or mistake; but the burden of showing fraud or mistake is upon the party impeaching it. *Kock* v. *Bonitz*, 4 Daly (N. Y.), 117. When a defendant acknowledges his indebtedness for a specific sum, being a balance of an account, the court is at liberty to treat it as an account stated, and give judgment for such balance. *May* v. *Kloss*, 44 Mo. 300.

§ 3. **What does not amount to.** A qualified or conditional acknowledgment that a certain sum is due to the plaintiff will not entitle him to recover upon an account stated. *Evans* v. *Verity*, Ryan & Moody, 239. And a defendant's admission that something is due to the plaintiff without specifying how much, does not entitle him to a verdict for even nominal damages on an account stated. *Kirton* v. *Wood*, 1 Mood. & Rob. 253; *Lane* v. *Hill*, 18 Ad. & El. (N. S.) 252. And see *Tucker* v. *Barrow*, 7 Barn. & Cress. 623; 1 Wait's Law & Pr. 722. Where a landlord demanded £40 from an incoming tenant upon his agreement to pay for the crops growing upon the ground, the tenant offered to pay £17, and this was held to be no evidence to support a count upon an account stated. *Wayman* v. *Hilliard*, 7 Bing. 101.

In an action on a county treasurer's bond, where the answer alleged that the board of supervisors had examined the treasurer's account, and had objected only to certain specified items, and directed the district attorney to bring suit for the amount of these items; it was held that there was no account stated between the board and the treasurer, and

that a suit could be maintained for the additional items. *Milwaukee County* v. *Hackett*, 21 Wis. 613.

Although parties may agree upon a settlement made between them as to the amount due from one to the other, yet such agreement is not conclusive if it was the result of an error in regard to the items, or in the computation of interest. *Town* v. *Wood*, 37 Ill. 512. And where a gardener who could not read handwriting allowed his employer to invest his wages, and received from time accounts of the sums due him, it was held that the gardener was not bound by an account, the contents of which he did not know, stating that the balance due was in a particular currency, a previous account having stated the same balance without specifying the currency. *Guenivet* v. *Perret*, 18 La Ann. 356.

An account made by one party against the other is not an account stated between the parties, and merely retaining it by the latter party without objection is but slight evidence of its correctness in charging him with money paid to a third person on his account. *Spangler* v. *Springer*, 22 Penn. St. 454.

A claim which is absolutely void by reason of an illegality or immorality in the consideration, cannot be relied on in support of a count upon an account stated. *Kennedy* v. *Broun*, 13 C. B. (N. S.) 677.

§ 4. **When it may be opened.** Accounts stated may be opened in equity, and the whole account be taken *de novo* for gross mistake in some cases; but this can only be done where the gross error affects all the items of the transaction. *Branger* v. *Chevalier*, 9 Cal. 353; *Goodwin* v. *United States Ins. Co.*, 24 Conn. 591. And where there has been an accounting and settlement, if it afterward appear that a clear mistake occurred by the omission to include a considerable sum of money, an action will lie to correct such mistake and to collect such sum. *McDougall* v. *Cooper*, 31 N. Y. (4 Tiff.) 498. But a settlement can only be opened on the ground of fraud, errors, or mistakes, and such grounds must be specifically set forth in the pleadings. *Kronenberger* v. *Binz*, 56 Mo. 121; *Threlkeld* v. *Dobbins*, 45 Ga. 144. And see Vol. I, pp. 196, 197.

§ 5. **When it cannot be opened.** After an assent of the parties to an account stated, an action lies for the balance as an original demand, on an implied promise of payment; and the account cannot be re-examined to ascertain the items, unless for alleged fraud or mistake. *Hawkins* v. *Long*, 74 N. C. 781; *Kock* v. *Bonitz*, 4 Daly (N. Y.), 117; *Sutphen* v. *Cushman*, 35 Ill. 186; *Horan* v. *Long*, 11 Tex. 230; *Pratt* v. *Weyman*, 1 McCord's Ch. 156. And the proof of the fraud or error must be clear, especially after a great lapse of time. *Phillips* v. *Belden*, 2 Edw. Ch. 1.

A stated account will not be opened where it appears that the plaintiff has been guilty of negligence in detecting the errors he has discovered. *Bruen* v. *Hone*, 2 Barb. 586; *Hutchins* v. *Hope*, 7 Gill (Md.), 119; *Gregory* v. *Forrester*, 1 McCord's (S. C.) Eq. 318, 332. And, where a party not standing in the relation of trustee, in stating his claim omits to give his debtor a credit for a payment made, and they settle, the debtor cannot after the lapse of six years open the account on the ground that he has but recently discovered the mistake. *Randel* v. *Ely*, 3 Brewst. (Penn.) 270. See *George* v. *Johnson*, 45 N. H. 456; *Ogden* v. *Astor*, 4 Sandf. (N. Y.) 311. And see Vol. I, p. 197.

§ 6. **To what extent opened.** In opening an account the correction of errors is sometimes allowed on both sides. *Floyd* v. *Priester*, 8 Rich. Eq. (S. C.) 248. And see Vol. I, p. 197.

Judgment may be rendered, on motion, on such items of an account as are admitted to be correct by the defendant, reserving the right of the defendant to contest items not admitted.

§ 7. **Proof required or allowed.** To make an account stated, there must be a mutual agreement between the parties as to the allowance or disallowance of their respective claims; and to establish such an account so as to preclude a party from impeaching it, save for fraud or mistake, there must be proof of assent to the account as rendered, either express, or implied from failure to object within a reasonable time after presentation. *Stenton* v. *Jerome*, 54 N. Y. (9 Sick.) 480; *Stevens* v. *Tuller*, 4 Mich. 387. Loose declarations and admissions by a defendant to a third party, not an agent of the plaintiff, of an indebtedness to the plaintiff, are not sufficient evidence of an account stated. *Thurmond* v. *Sanders*, 21 Ark. 255. And see *Calvert* v. *Baker*, 4 M. & W. 417; *Newhall* v. *Holt*, 6 id. 662.

Doubtful or even probable testimony is not sufficient to open a long settled account in the absence of any proof of fraud or undue influence. Upon this principle the testimony of a witness that errors in the account were admitted by the defendant, on an occasion many years before the trial and many years after the occurrence of the errors in question, is not sufficient, if it does not appear that any memorandum of the admissions was ever made by the witness, and his recollection is not corroborated and is not complete in regard to material points. The whole burden of proof is on the party seeking to open such an account. *McIntyre* v. *Warren*, 3 Abb. (N. Y.) App. Dec. 99; S. C., 3 Keyes, 185.

In an action on an account stated, signed and acknowledged by the defendant to be correct, the answer set up that the defendant had been induced to sign the account by the misrepresentations of the plaintiffs,

and that the account was not correct. On the trial one of the plaintiffs was subpœnaed to produce the firm books containing the account, but he failed to do so, and stated that they were lost. Defendant's counsel then swore that on an examination before trial, when the books were produced, one of the plaintiffs had given evidence which contradicted the account sued upon. It was held that this was sufficient evidence on the subject of misrepresentation in obtaining the defendant's acknowledgment of the account to entitle him to have it submitted to the jury. *Upton* v. *Bedlow*, 4 Daly (N. Y.), 216; S. C., 42 How. 121.

The balance of a stated account is principal; it cannot be re-examined to ascertain the items or their character. *McClelland* v. *West*, 70 Penn. St. 183.

Where the directors of a mine on the cost-book principle, wanting money to work the mine, entered into an agreement that they should each take 100 shares in it, at £1 per share, and each of them accordingly gave his *I O U* to the secretary for £100, it was held that this was evidence of an account stated between the secretary and a director who had given his I O U pursuant to that agreement. *Graves* v. *Cook*, 36 Eng. Law & Eq. 515. And see *Douglas* v. *Holmes*, 4 P. &. D. 685.

In an action upon an account stated between the plaintiffs jointly on the one hand and the defendants jointly upon the other, where separate answers of the defendants put in issue the stating of the account, the plaintiffs may, if they prove the stating of the account by one of the defendants, recover against that one alone. *Reed* v. *Pixley*, 22 Minn. 540. The stated account once proved, it would require clear and convincing proof of fraud or mistake to open it. *Bull* v. *Harris*, 31 Ill. 487.

§ 8. **Pleading defense.** A stated account, in order to bar a suit for an account, must be averred in the defendant's plea to be just and true, according to the best of his knowledge and belief. *Driggs* v. *Garretson*, 25 N. J. Eq. 178. And a defendant is not entitled to open an account unless a sufficient foundation therefor is laid in the answer. *Slee* v. *Bloom*, 20 Johns. 669. In an action on an account stated he *may* plead and prove that the whole claim was founded upon an illegal transaction. *Dunbar* v. *Johnson*, 108 Mass. 519. But the rule that receiving and retaining an account without objection converts it into an account stated, ought not to be applied in favor of the party; as where he claims that the statute of limitations commenced to run from the time of rendering the account. The conversion of an open account into an account stated is an operation by which the parties *assent* to a

sum as the correct balance due from one to the other, and whether this operation has been performed or not in any instance, must depend upon the facts. That it has taken place may appear by evidence of an express understanding, or of words and acts, and the necessary and proper inferences from them. When accomplished, it does not necessarily exclude all inquiry into the rectitude of the account. The parties may still impeach it for fraud or mistake. But so long as it is not impeached, the agreed statement serves in place of the original account, as the foundation of an action. It becomes an original demand and amounts to an express promise to pay the actual sum stated. The creditor becomes entitled to recover the agreed balance in an action based upon the fact of its acknowledgment by the debtor, upon an adjustment of their respective claims.

It is held, that, as against a party receiving an account, and not objecting to it within a reasonable time, its correctness may be considered as admitted by him and the balance as the debt. But the cases in which this has been held have all been cases in which the party who was interested to claim that assent was established by acquiesence, was the one who rendered the account, not the one who received it. Considering the origin and nature of the rule, the recipient of the account, if he has chosen to hold an equivocal position in such a case, is not at liberty to assert the rights which pertain to a definite and decided one. He ought not to be allowed, at his election, to turn his own considerate inaction and reticence into a positive admission in his own favor, to serve as the very basis of his defense under the statute of limitations. When he claims the benefit of the statute on the ground that the account sued on has been converted into a stated one, through his assent to it as rendered to him, it is not enough to substantiate the defense that there is no evidence as to whether he objected or not, nor is it sufficient to sustain such a defense to prove that upon and after the exhibition of the account he remained perfectly passive. He must go further. He must show some word or act marking or implying that he assented to the account. *White* v. *Campbell*, 25 Mich. 463.

The stating of an account is not conclusive, but errors in it may be shown under a general denial. *Bouslog* v. *Garrett*, 39 Ind. 338; *Thomas* v. *Hawkes*, 8 M. & W. 140; S. C., 9 D. P. C. 802. And the defendant may give in evidence a subsequent account in his favor. *Fidgett* v. *Penny*, 1 C. M. & R. 108; S. C., 2 D. P. C. 714; 4 Tyr. 650.

It is a good plea that the account was stated solely of and concerning charges for work done as an attorney, and that no bill of costs was delivered. *Scadding* v. *Eyles*, 9 Q. B. 858. And on a settlement of

accounts between the plaintiff and the defendant, the latter overpaid the plaintiff £1 11s. 5d. which they agreed should go in discharge of the plaintiff's ensuing account. The plaintiff having afterward done work for the defendant, sued him for the amount; and it was held that the defendant had a good defense, as to the amount before overpaid, under a plea of never indebted. *Smith* v. *Winter*, 12 C. B. 487.

# CHAPTER IV.

## ACT OF GOD, OR OF THE LAW.

### ARTICLE I.

#### WHEN A DEFENSE.

**Section 1. In general.** An act of God is an accident which arises from a cause which operates without interference or aid from man (1 Pars. on Cont. 635); the loss arising wherefrom cannot be guarded against by the ordinary exertions of human skill and prudence so as to prevent its effect. *Nugent* v. *Smith*, L. R., 1 C. P. Div. 423; S. C., 17 Eng. R. 330; *post*, p. 433, § 2. The term is sometimes defined as equivalent to inevitable accident, but incorrectly, as there is a distinction between the two.

Where the *law* casts a *duty* on a party, the performance shall be excused if it be rendered impossible by the act of God; but where the party, *by his own contract*, engages to do an act, it is deemed to be his own fault and folly that he did not thereby provide against contingencies, and exempt himself from responsibilities in certain events; and in such case (that is in the instance of an absolute general contract) the non-performance is not excused by an inevitable accident or other contingency, although not foreseen by nor within the control of the party. See id.; *Chicago, etc., R. R. Co.* v. *Sawyer*, 69 Ill. 285; 18 Am. Rep. 613; 1 Bouv. Law Dict. 69. So in a contract of apprenticeship, by which it is agreed that the apprentice shall honestly remain with and serve his master during the term fixed, there is in law an implied condition that the apprentice shall not be prevented by the act of God from serving. *Boast* v. *Firth*, L. R., 4 C. P. 1. And a common carrier cannot defend an action for injury to goods by showing that the immediate cause of the injury was the act of God — in this case an extraordinary frost,—if the goods would not have been exposed to it but for a delay in transportation. *Armentrout* v. *St. Louis, etc., Ry. Co.*, 1 Mo. App. 158. See *Friend* v. *Woods*, 6 Gratt. (Va.) 189; *Ferguson* v. *Brent*, 12 Md. 9, 33; *Forward* v. *Pittard*, 1 T. R. 27, 33.

To an action upon a recognizance or an obligation, impossibility, by act of God, of performance of the condition, is a good defense. *Leitrim*

(*Earl*) v. *Stewart*, 5 Ir. R. C. L. 27. But an agreement to do one of two things is not discharged when one becomes impossible by the act of God. *Barkworth* v. *Young*, 4 Drew. 1; S. C., 3 Jur. (N. S.) 34; 26 L. J. Ch. 153.

§ 2. **What deemed an act of God.** By the term "act of God," in its legal sense, is meant such inevitable accident as cannot be prevented by human care, skill or foresight; but results from natural causes, such as lightning and tempest, floods and inundations. *McHenry* v. *Railroad Co.*, 4 Harr. (Del.) 448; *Chicago, etc., Ry. Co.* v. *Sawyer*, 69 Ill. 285; S. C., 18 Am. Rep. 613. It must be a direct and violent act of nature, wholly unconnected with human agency, to constitute a defense. *Friend* v. *Woods*, 6 Gratt. (Va.) 189; *Ferguson* v. *Brent*, 12 Md. 33; *Coggs* v. *Bernard*, 1 Sm. Lead. Cas. (7th Am ed.) 369, 418; *Michaels* v. *N. Y. C. R. R. Co.*, 30 N. Y. (3 Tiff.) 564. And see Vol. 2, p. 25.

The freezing up of a canal or river is "an act of God" (*Lowe* v. *Moss*, 12 Ill. 477; *Parsons* v. *Hardy*, 14 Wend. 215; *Harris* v. *Rand*, 4 N. H. 259; *Richards* v. *Gilbert*, 5 Day [Conn.], 415); an extraordinary snow storm or a flood. *Briddon* v. *Great Northern Railway Co.*, 28 L. J. (N. S.) Exch. 51; *Ballentine* v. *North Missouri*, 40 Mo. 491; *Wallace* v. *Clayton*, 42 Ga. 443; *Read* v. *Spaulding*, 5 Bosw. 395; S. C. affirmed, 30 N. Y. (3 Tiff.) 630. So in case of an extraordinary interruption of communication along the line of transit (as by storm, flood, earthquake, or war), necessitating a considerable delay in transportation, a carrier, in whose hands goods are, may store them and at once give notice to the consignee, and thus absolve himself from liability as carrier while such interruption continues. *Conkey* v. *Milwaukee, etc., R. R. Co.*, 31 Wis. 619; 11 Am. Rep. 630.

A storm of rain may be so unprecedented in its character as, like an earthquake in the country, to be properly called an act of God or a *vis major*, not in the sense that it was physically, but that it was practically, impossible to resist it, having regard to the reasonable use of property in the way most beneficial to the owners. *Nichols* v. *Marsland*, L. R., 2 Exch. Div. 1; L. R., 10 Exch. 255; S. C., 14 Eng. R. 538.

Loss of goods by a *jettison* rendered necessary by a violent and unusual storm is a loss by "act of God," within the exception as to a carrier's liability; notwithstanding the throwing overboard is done by man. *Price* v. *Hartshorn*, 44 N. Y. (5 Hand) 94; S. C., 4 Am. Rep. 645; affirming S. C., 44 Barb. 655.

Where fruit trees shipped on a railroad were frozen while *en route*, the freezing was held to be the "act of God" for which the company

was not liable, unless caused by unnecessary delay in transporting them, or their careless exposure to the cold, and the burden was held to be on the owner to show such careless exposure. And if frozen while remaining in the cars at the terminus of the route, instead of being placed in the warehouse, the company was not responsible on that account, if the cars afforded a better shelter than the warehouse. *Vail* v. *Pacific R. R.*, 63 Mo. 230.

A common carrier was held not guilty of negligence, in a case where a wagon containing the goods in question was blown off an open railroad car in a high wind. *Miltimore* v. *Chicago, etc., R. R. Co.*, 37 Wis. 190.

A carrier by canal is excused, on the ground of inevitable accident, for a loss of goods caused by a dam in the canal giving way, in consequence of an extraordinary flood, if no want of diligence or skill is attributable to the carrier. And, although horses are, in general, part of the equipment of a canal boat, for the sufficiency of which the carrier is responsible, yet, the mere fact that the boat was delayed on her way by the lameness of a horse, in consequence of which she happened to be at the place of the flood, when it occurred, will not render the carrier liable. *Morrison* v. *McFadden*, 5 Clark (Penn. L. J. R.), 23.

Where an order of bastardy was made on the 8th of February, and on the 9th the mother of the child died; and on the 12th the appellant entered into the proper recognizance, and on the same day sent a written notice of his having done so by the post addressed to such mother, it was held that the sessions were bound to hear the appeal, the appellant being excused from performing the duty of giving notice by its becoming impossible by the act of God. *Reg.* v. *Leicestershire* (*Justices*), 15 Q. B. 88; S. C., 4 New Sess. Cas. 124.

§ 3. **What not deemed an act of God.** Running upon the mast of a sunken vessel has been held to be not "an act of God." *Merritt* v. *Earle*, 31 Barb. 38; S. C. affirmed, 29 N. Y. (2 Tiff.) 115. And *Redpath* v. *Vaughan*, 52 Barb. 489; S. C. affirmed, 48 N. Y. (3 Sick.) 655. And so, of a collision of two vessels at sea, although no fault be imputable to either. *Mershon* v. *Hobensack*, 2 Zabr. (N. J.) 372; *Plaisted* v. *B. & K. Steam Nav. Co.*, 27 Me. 132; *Oakley* v. *Portsmouth & Ryde Steam Packet Co.*, 11 Exch. 618; S. C., 25 L. J. Exch. 99. Destruction by an accidental fire, not caused by lightning, is not by the "act of God." *Miller* v. *Steam Nav. Co.*, 3 Barb. 361; S. C. affirmed, 10 N. Y. (6 Seld.) 431. And see *Chamberlain* v. *The Western Trans. Co.*, 44 N. Y. (5 Hand) 305; S. C., 4 Am. Rep. 681.

§ 4. **Act of the law as a defense.** A common carrier is excused

from liability for not carrying and delivering goods, when, without any act, fault, or connivance on the part of the carrier, they are seized by virtue of legal process and taken out of his possession. But he should give immediate notice to the persons interested of this seizure. *Ohio, etc., R. R. Co.* v. *Yohe*, 51 Ind. 181; 19 Am. Rep. 727. But it is no defense to an action against him for a breach of his contract to deliver goods, that they were taken from him by an officer under an attachment against a person who was not their owner. *Edwards* v. *White Line Transit Co.*, 104 Mass. 159; S. C., 6 Am. Rep. 213. And if goods exempt from attachment are taken from a carrier by an officer, who attaches them as the property of the owner, it is no defense to an action against the carrier by the owner for a failure to deliver the goods, that they were taken from him against his will, and without fraud or collusion on his part, or that he was ignorant of the nature of the goods and supposed the attachment to be valid. *Kiff* v. *Old Colony, etc., Railway Company*, 117 Mass. 591; S. C., 19 Am. Rep. 429. Vol. 2, p. 29.

Where a carrier receives goods for transportation, knowing they are subject to duty to the United States government, and are being shipped from one collection district to another, and that, by the law of Congress and the regulation of the revenue department, they can be delivered only into a bonded warehouse, to be reached in compliance only with certain specific regulations, he impliedly undertakes that the goods shall be safely delivered at the place of their destination in the special manner required, and within a reasonable time, and if a loss occurs in consequence of a neglect of such duty the carrier will be liable. *Chicago, etc., R. R. Co.* v. *Sawyer*, 69 Ill. 285; S. C., 18 Am. Rep. 613.

# CHAPTER V.

## ADVERSE POSSESSION.

### ARTICLE I.

#### OF ADVERSE POSSESSION IN GENERAL.

**Section 1. Definition and nature.** The enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued under an assertion or color of right on the part of the possessor, is adverse possession. *Campbell* v. *Wilson*, 3 East, 294; *Smith* v. *Burtis*, 9 Johns. 174. An adverse user is such a use of the property as the owner himself would make, asking no permission, and disregarding all other claims to it so far as they conflict with this use. *Blanchard* v. *Moulton*, 63 Me. 434. Adverse possession, uninterrupted and notorious, for the statutory time, under claim of title in fee, vests the title to the land claimed in the claimant so holding possession, as effectually as though such title had been acquired by deed. *Wall* v. *Shindler*, 47 Mo. 282; *Denn* v. *Barnard*, Cowp. 595; *Arrington* v. *Liscom*, 34 Cal. 365. See *Holmes* v. *Gay*, 6 Bush (Ky.), 47; *Crook* v. *Glen*, 30 Md. 55.

The doctrine of adverse possession arises in the judicial construction of the statute of limitations, and such is the diversity of decisions upon it, and so much speculation has been indulged in regard to it, that it can hardly be considered as settled upon sound and distinct elementary principle. About three centuries have elapsed since the enactment of the English statute of limitations—emphatically and appropriately styled "the statute of repose"—and which has been generally adopted in this country, and was substantially re-enacted soon after the organization of our government. It was adopted in England after near a century of experience under a statute of Henry VIII, of more than double the period intended and calculated "to impose diligence on, and vigilancy in him that was to bring his action;" and has been sustained by the united concurrence and approbation of all succeeding legislators and jurists, to the present time. The object and obvious tendency of the statute is to promote the peace and good order of society, by quieting possessions and estates, and avoiding litigation. But for its inter-

vention there would be no end to the revival of dormant and antiquated titles, and many an honest citizen who now, by its benignant operation, enjoys in security the few acres his industry has acquired, and which have been improved by his labor, and enriched by "the sweat of his brow," would be driven from his home by an enemy more insidious and more destructive to the peace of the community than an invading army. *La Frombois* v. *Jackson*, 8 Cow. 589, 615. And see *Reformed Church* v. *Schoolcraft*, 65 N. Y. (20 Sick.) 134; Vol. 3, pp. 98–109.

§ 2. **What is an adverse possession.** Adverse possession is made out by the co-existence of two distinct ingredients: the first, such a title as will afford color; and, second, such possession under it as will be adverse to the right of the true owner; and whether these two essentials exist is, in all cases, a question of law, to be determined by the court, though the facts upon which they are founded are for the finding of the jury. *Baker* v. *Swan*, 32 Md. 355; *Dixon* v. *Cook*, 47 Miss. 220. See *Washburn* v. *Cutter*, 17 Minn. 361. To determine what acts are sufficient to constitute an adverse possession, attention should be given to the character of the property, to discover the object of owning it, and the uses to which it would ordinarily be applied, that the mind with which it was possessed, as well as the mind with which such possession was acquiesced in, may be the better understood. *Corning* v. *The Troy Iron and Nail Factory*, 44 N. Y. (5 Hand) 577.

It is the general rule that every possession of land has the presumption of right in its favor (*Smith* v. *Lorillard*, 10 Johns. 338, 356); and this being a presumption of law, may be contradicted or destroyed by proof; but until it is destroyed the possession is adverse to any other claimant. The presumption which the law thus raises in favor of the actual occupant may be destroyed by proof of his having received a lease, or evidence of his having paid rent, or acknowledged the title set up, or it may be destroyed by showing that the occupant entered without pretending to any claim of right whatever; in which case the law adjudges the possession to be in subservience to the legal owner (*Jackson* v. *Thomas*, 16 Johns. 293, 301); for he can derive no benefit from a legal presumption, who, by his own acts, shows that the presumption cannot apply, the fact that no claim of right was made showing that none existed. Hence a claim of right is necessary, not because the statute requires it, but because the want of such claim is evidence sufficient to destroy the legal presumption of right. The intent with which a possession is taken or held furnishes the true test of its character; and the intention being to be inferred from circumstances, and being of the proper cognizance of the jury as a matter of fact, they will be war-

ranted in inferring from the circumstances that no claim of right was made, and that the party entered for the benefit of the true owner, whenever he shall choose to assert his title.

Every possession, then, is adverse, and entitled to the peaceful and benignant operation and protecting safeguards of the statute, which is not in subservience to the title of another, either by a direct acknowledgment of some kind, or an open or tacit disavowal of right on the part of the occupant; and it is in the latter case only that the law adjudges the possession of one to the benefit of another. *LaFrombois* v. *Jackson*, 8 Cow. 589, 618. And see *United States* v. *Arredondo*, 6 Pet. 691, 743; *Rogers* v. *Hillhouse*, 3 Conn. 398, 403; *Ray* v. *Barker*, 1 B. Monr. 364; *Read* v. *Thompson*, 5 Penn. St. 327; *McIver* v. *Ragan*, 2 Wheat. 25, 29; *Turner* v. *Hall*, 60 Mo. 271; *Gulf R. R. Co.* v. *Owen*, 8 Kans. 409.

A wrongful continuation of possession for twenty years after the expiration of a title, under which the tenant lawfully entered, constitutes such an adverse possession as creates a bar to an entry, or to an ejectment. *Parker* v. *Gregory*, 4 N. & M. 308; S. C., 2 A. & E. 14. An exclusive possession by one tenant in common of all the land on one side of a line agreed upon between him and his co-tenants, for over twenty years before suit, he paying taxes and exercising other acts of ownership, is a bar to a recovery of such part by his co-tenants. *Rider* v. *Maul*, 46 Penn. St. 376. And a refusal by a joint tenant or tenant in common to let his co-tenant participate in the enjoyment of the common property constitutes an adverse possession. *Dan* v. *Moore*, 3 Wall. Jr. 292. A person seized in fee simple has a constructive possession of the premises of which he is seized, and will be presumed to be in the actual possession thereof, until the contrary appears. *Lamb* v. *Burbank*, 1 Sawyer, 227; *Washburn* v. *Cutter*, 17 Minn. 361. The possession of one who has bought land unconditionally, and paid for it, under an agreement that a deed shall be made, is adverse to the vendor. Such executed contract is a sale, and not merely an agreement to purchase. *Ridgeway* v. *Holliday*, 59 Mo. 444.

By the law of Wisconsin, occupation under paper title, by mining operations, continuous, visible, and notorious, may constitute adverse possession. *Wilson* v. *Henry*, 40 Wis. 594.

When and how a possession originally taken in subordination to a paramount title may be converted into one adverse to it, see *Hamilton* v. *Boggess*, 63 Mo. 233.

Since the statute of 3 & 4 W. 4, c. 27, s. 2, which defines the time when the right of entry shall be considered as having first accrued, the

doctrine of adverse possession is altogether done away with in England. *Watt* v. *Morris*, 2 Bing. N. C. 189; S. C., 2 Scott, 276.

§ 3. **Of the claim of title.** To constitute an adverse possession, entry must be made with defined claim of title and of possession; and, after entry, such claim cannot be enlarged, except by acts equivalent to a new entry and new claim of adverse possession. *Pepper* v. *O'Dowd*, 39 Wis. 538. It is not necessary that the possession was taken in good faith. But there must be an intent to claim and to possess the land. *Bradley* v. *West*, 60 Mo. 33; *Humbert* v. *Trinity Church*, 24 Wend. 587. The quality and extent of the right acquired by possession of lands depend upon the claim accompanying it. Only to the extent of the claim will the presumption of the law go in favor of the right. Possession to be adverse, so as to ripen into a title when long enough continued, must be accompanied by a claim of title in fee. A claim simply of an unexpired term for years is not in hostility, but in accord with, the true title. *Bedell* v. *Shaw*, 59 N. Y. (14 Sick.) 46; *Lovell* v. *Frost*, 44 Cal. 471. Where parties enter upon land, and take possession without title, or claim of title, such occupation is subservient to the paramount title, not adverse to it. *Harvey* v. *Tyler*, 2 Wall. (U. S.) 328. So, where one in possession of lands offers to purchase them from the true owner, and this offer is made, not merely to buy an outstanding or adverse claim, in order to quiet his possession, or protect himself from litigation, the offer is a recognition of the owner's title, and will stop the running of the statute. *Lovell* v. *Frost*, 44 Cal. 471. The ordinary use of a street by a railroad company, for its track and trains, being a use as a way only, can never, by any lapse of time, and even though continuous and exclusive, ripen into a title to the fee of the strip of land used. For them to gain such title upon the principles of adverse possession, it must appear that they occupied the land under a claim of ownership of the soil, and adversely to the use of it by the public as a street. *Indianapolis, etc., R. R. Co.* v. *Ross*, 47 Ind. 25. So, too, wherever the owner of land throws it open to the public to pass and repass on, in connection with the use to which he appropriates it, the mere use of the land by an adjoining proprietor for a way to his own premises, though that use is uninterrupted, open and notorious, will be presumed to be with the permission of the proprietor, and will not be presumed to be adverse to the owner, or under a claim of right by the adjoining proprietor. The party claiming to establish a right of way, in such case, must show some act appropriating the way peculiarly to himself, more pronounced and more clearly indicative of a claim of right than the open and notorious use of the way by himself. *Plimpton* v. *Converse*, 44 Vt. 158.

But in Connecticut it is said that claim of ownership is not, as matter

of law, an indispensable element of adverse possession. Although, in general, assertion of title by the possessor of land is an important circumstance, indicating adverse possession and ouster of the real owner, and the absence of such assertion may be an important circumstance indicating that the possession is not adverse, yet the question of ouster must depend upon all the circumstances of the case. *Johnson* v. *Gorham*, 38 Conn. 513. Ordinarily the possession of one who does not hold the true title can extend only to the land in actual occupancy. The owner holds constructive possession of lands not actually occupied by others, and cannot be disseized by a mere claim; there must be something more. In addition to the actual occupancy of a part, by an open, notorious and continuous possession as owner, there must be a claim to the whole, by the same right under which the part actually occupied is held; and such claim must be *bona fide*, and evidenced by some paper or proceedings or relation under which the claimant is the apparent owner of the whole. *Crispen* v. *Hannavan*, 50 Mo. 536. A party who holds possession of land under a contract, the terms of which he does not comply with, can never acquire a title by adverse possession, unless the owner is aware that the possession is adverse. *Robinson* v. *Sherwin*, 36 Vt. 69. And in cases of mixed possession, where both claimants actually occupy parts, under adverse claims to the whole, the true title will prevail against the one merely colorable, and the adverse claimant will be confined to the portion actually occupied. *Crispen* v. *Hannavan*, 50 Mo. 536. So, where the purchaser of a tract of land, through mistake or fraud, enters upon another tract of the same vendor, the entry is under a claim of title assumed to have been derived from the vendor, and is in subordination of the vendor's title. *Farish* v. *Coon*, 40 Cal. 33.

It is well settled that, to become the basis of prescription, the title must be apparently good, and of a kind calculated to induce a belief in the purchaser that it is perfect. A title defective in form cannot be a basis of prescription. By this the law means a title on the face of which some defect appears, and not one that may prove defective by circumstances or evidence *dehors* the instrument. *Hall* v. *Mooring*, 27 La. Ann. 596. An assessment lease, executed by the corporate authorities of the city of Albany, upon a sale made under the city charter of 1828 (§§ 4, 5, chap. 164, Laws of 1828), is not *prima facie* evidence of the regularity of the proceedings or the sale; the act requires official action and recorded evidence of the principal steps preliminary to a sale; and to sustain it, the proceedings must be proved. *Hilton* v. *Bender*, 69 N. Y. (24 Sick.) 75; reversing S. C., 2 Hun, 1; 4 N. Y. S. C. (T. & C.) 270. The clause of said charter which declares

that the purchaser shall "hold the land against the owner and all persons claiming it," does not obviate the necessity of such proof. Id. Mere lapse of time will not raise a conclusive presumption that the proceedings were regular. Id. Possession under a deed duly recorded is constructive notice that he who is in possession is claiming adversely, the presumption being that he is claiming under and according to his title. *Forest* v. *Jackson*, 56 N. H. 357. He is deemed to have seisin of the land co-extensive with the boundaries stated in his deed, where there is no open adverse possession of any part of the land so described in any other person. *Brackett* v. *Persons Unknown*, 53 Me. 228.

An entry upon land in possession of another, in order to work a legal interruption of such possession, must be made under such circumstances as to enable the party in possession, by the use of reasonable diligence, to ascertain the fact of entry, and the right of claim of the party making it. *Soule* v. *Barlow*, 49 Vt. 329. In Vermont where gores of land are municipal divisions, and the land in any one gore may be owned in various ways, acts of possession or occupation relating to one tract will not be extended by construction so as to support a claim of title to the whole gore. *Paine* v. *Hutchins*, 49 Vt. 314.

The possession of a party who enters under an executory contract to purchase land, and subsequently obtains his deed in pursuance of the contract, is adverse from the time of entry as to all the world except the vendor. *Howland* v. *Newark Cem. Assoc.*, 66 Barb. 366. A grantor may set up, as against his own deed, a title acquired by him by a contemporaneous or a subsequent practical location, with an adverse possession for the requisite length of time. *Cramer* v. *Benton*, 64 Barb. 522; 56 N. Y. (11 Sick.) 638. And though he cannot set up a hostile title existing at the time of the conveyance, yet, if the deed be a mere quit-claim, without covenant, or fraud, he may acquire and set up any other title, whether existing at the time of his conveyance, or subsequently acquired. Id.

To make the actual adverse possession of part of a tract of farming land once possessed and used as several farms, by several owners, constructive adverse possession of the whole tract as one farm, it must be shown not merely that the whole tract is included in some of the claimant's title papers, but that the several farms had been joined together in one known farm before the entry under which he claims, and constituted one known farm at the time of such entry. *Pepper* v. *O'Dowd*, 39 Wis. 538.

Where a party claims title under the Illinois limitation laws he must deduce a title directly from a specified source, and by a chain each link of which is a genuine conveyance. *Hedges* v. *Paulin*, 5 Biss. 177.

Twenty years' adverse possession of land, accompanied by payment of taxes under a continuous assertion of ownership hostile to all others, will constitute a bar to a right of entry by any one not within any saving clause of the Illinois statute, claiming to have paramount title, whether the claim of the party in possession is rightful or even under a muniment of title or not. And to constitute possession under the limitation laws, it is not necessary that a party should have his land all inclosed with a fence. As a general rule it is sufficient if the land is appropriated to individual use in such a way as to apprise all persons in the vicinity who has the exclusive use and enjoyment. *Kerr* v. *Hitt*, 75 Ill. 51. The presumption is that the use of land, as in the case of a private way, when entered upon by consent of the owner, or of those through whom he claims, was continued by such consent, and not under adverse claim of right. *Cooper* v. *McBride*, 4 Houst. (Del.) 461.

Where a person relies on title by adverse possession, to land included in a Mexican grant, he need not show that he claimed adversely to the United States, but only to the title on which the plaintiff relies. *Hayes* v. *Martin*, 45 Cal. 559.

§ 4. **Of color of title.** In some of the States, by statute, color of title is not essential as a basis for an adverse possession; but in no case can there be a constructive possession of land without color of title. *Wells* v. *Jackson Manuf. Co.*, 48 N. H. 491. See *Jackson* v. *Berner*, 48 Ill. 203; *Beatty* v. *Mason*, 30 Md. 409. It does not always require a written instrument to constitute color of title, but there must be some visible acts or *indicia* which are apparent to all, showing the extent of the boundaries of the land claimed, to amount to color of title (*Cooper* v. *Ord*, 60 Mo. 420. See *Atkinson* v. *Patterson*, 46 Vt. 750); color of title may be created by an act *in pais*. A verbal gift of land with a survey and a surrender of possession may create it. *Rannels* v. *Rannels*, 52 Mo. 108. Neither is a valid and perfect title required in order to entitle a party to rely upon an adverse possession under the statute of limitations. *Close* v. *Samm*, 27 Iowa, 503; *Field* v. *Boynton*, 33 Ga. 239; *Hines* v. *Robinson*, 57 Me. 324; *Nowlin* v. *Reynolds*, 25 Gratt. (Va.) 137. But the instrument relied upon must purport to convey a title. A sheriff's deed which lacks a seal may constitute color of title. *Kruse* v. *Wilson*, 79 Ill. 233; *Hamilton* v. *Boggess*, 63 Mo. 233. So may a sheriff's deed under a void sale. *Fritz* v. *Joiner*, 54 Ill. 101. So, of a deed with a defective acknowledgment. *Dalton* v. *Bank of St. Louis*, 54 Mo. 105. A mere quit-claim deed. *McCamy* v. *Higdon*, 50 Ga. 629. A tax collector's deed. *Rivers* v. *Thompson*, 43 Ala. 633. A paper writing purporting to be a will, proved before the proper tribunal in 1810, by the oath of one witness. *McConnell* v.

*McConnell*, 64 N. C. 342. But a bond to give a deed on the payment of a price does not purport to convey title, and cannot constitute color. *Rigor* v. *Frye*, 62 Ill. 507.

A deed which purports to give a complete title may be sufficient to give color of title, although the grantor had, in fact, only the rights of a mortgagee. *Stevens* v. *Brooks*, 24 Wis. 326. And see *Sands* v. *Hughes*, 53 N. Y. (8 Sick.) 287; *Huls* v. *Buntin*, 47 Ill. 396. Where a tenant for life grants an estate in fee, the possession of his grantee becomes adverse from the time of his death. *Saunders* v. *Hanes*, 44 N. Y. (5 Hand) 353. The heirs of one who held adversely under a mere claim of right are in possession under color of title. *Teabout* v. *Daniels*, 38 Iowa, 158. And although a sale of lands of a decedent was made by an administrator without due authority of law, yet, if all the parties to it supposed it was authorized, the sale and deed may give color of title. *Crispen* v. *Hannavan*, 50 Mo. 536. A conveyance in disregard of his client's interests by an attorney who acquired title for the benefit of his client, not in his own right, may give an innocent purchaser for value, color of title. *Hardin* v. *Osborne*, 60 Ill. 93.

Where lands were sold for delinquent taxes under a judgment rendered at a special term, but the sale was made at a day later than that fixed by law, which appeared from the recitals in the deed purporting to convey the land, it was held that the deed constituted color of title, and the grantee should not be charged with bad faith by reason of such recitals, although afterward the supreme court settled the law to be that such a sale could not be made on a day different from that fixed by law. *Hardin* v. *Crate*, 60 Ill. 215.

An entry on lands by one without color of title or claim of right may subsequently become adverse by his acquiring and asserting a claim of title; and the statute of limitations begins to run from the time of such assertion. *Hamilton* v. *Wright*, 30 Iowa, 480. Adverse possession under a sale pursuant to a deed of trust, although the sale was made without sufficient notice, is based upon color of title, and is entitled to the protection of the statute of limitations. *Gebhard* v. *Sattler*, 40 Iowa, 152.

The question whether one who holds by color of title, holds in good faith, or bad, depends upon the purpose with which he acquired the title relied on, and the reliance placed upon it. If the holder received it knowing it to be worthless, or in fraud of the owner's rights, it cannot be said to be held in good faith. So if the deed discloses facts on its face showing it to have been illegally made, or made in fraud of the law, as where it appears on its face to have been made on a sale for taxes before the redemption expired, this will not prevent it from being

color of title, but will destroy the presumption of good faith. *Hardin* v. *Gouverneur*, 69 Ill. 140. Color of title is not necessarily impaired by proof that the holder acquired the title with notice of the defects which prevent its being regarded as a good title if he is not chargeable with fraud or bad faith. *Russell* v. *Mandell*, 73 Ill. 136.

Where a mortgagee attempts to foreclose his mortgage, and obtains a deed under a decree of foreclosure, the deed constitutes color of title, although the decree of foreclosure may be erroneous, or even void, provided there is no fraud connected with the attempted foreclosure. *Mason* v. *Ayers*, 73 Ill. 121.

A decree of partition or of foreclosure may become color of title, where a proper party thereto has been omitted without bad faith on the part of the claimant. *Rawson* v. *Fox*, 65 Ill. 200. See, too, *Hinkley* v. *Greene*, 52 Ill. 223. A deed of property from a person having authority to sell will confer color of title, for the purpose of prescription, under the laws of Louisiana. *Pike* v. *Evans*, 94 U. S. (4 Otto) 6. A deed by the husband of a life tenant, made after her decease, was held, under peculiar circumstances, to be color of title. *Forest* v. *Jackson*, 56 N. H. 357. Possession of real estate under a bond for a deed is sufficient to charge a purchaser from the obligor with notice of the obligee's color of title, and he takes at his peril. *Spitler* v. *Scofield*, 43 Iowa, 571.

Where a party in possession of land, of which his wife is seized, as heir, of an undivided part, takes a quit-claim deed from one of the other heirs, who is seized of an undivided fourth thereof, and who simply released and quit-claimed all his right, title and interest, such deed will constitute good color and claim of title to the extent of the grantor's interest, but no further. *Busch* v. *Huston*, 75 Ill. 343.

Where one takes possession under a deed giving color of title to certain land, his possession may be transferred to subsequent parties, and the possession of the different holders may be united so as to make up the statutory period; provided the possession be notorious, etc., and the claim thereby acquired will be good so far as the land actually in occupation is concerned. But such subsequent parties cannot hold other land merely by color of their first grantor's title, independent of any conveyance. And title so acquired by connected possessions may be defeated by subsequent adverse possession for the statutory period. *Cooper* v. *Ord*, 60 Mo. 420.

A *bona fide* purchaser, for a valuable consideration, of lands subject to the lien of a judgment, holds adversely to the judgment creditor from the hour he goes into possession. *Sanders* v. *McAffee*, 42 Ga. 250. Where a defendant in ejectment had bought in the title of a plaintiff in

a previous action of ejectment after recovery of judgment therein, it was held that such recovery did not disturb the defendant's color of title and possession thereunder. *O'Neal* v. *Boone*, 53 Ill. 35.

§ 5. **What is not an adverse possession.** The very essence of an adverse possession is, that the holder of it claims the right to his possession, not under, but in opposition to the title to which his possession is alleged to be adverse. So long as he claims to hold under that title his possession is not adverse to it, and the statute of limitations does not run against it. *Furish* v. *Coon*, 40 Cal. 33. So, when two co-terminous proprietors of land, who are ignorant of the true boundary line between their respective tracts, fix a line, with an agreement that each shall possess to that line till the true boundary is ascertained, and the true boundary, when ascertained, leaves one in possession of a portion of the other's land, this possession is not adverse, so as to set the statute of limitations in motion, until there is a distinct repudiation of the agreement under which it was taken. *Irvine* v. *Adler*, 43 Cal. 559. Where one tenant in common is in possession of land, it requires clear and satisfactory proof of a subsequent disseizin of a co-tenant to characterize his possession as being adverse, so as by lapse of time to bar a right of entry. It is not sufficient that he continues to occupy the premises and appropriates to himself the exclusive rents and profits, makes slight improvements on the land and pays the taxes. To constitute a disseizin there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as, by their own import, to impart information and give notice to the co-tenant that an adverse possession and an actual disseizin are intended to be asserted against him. *Busch* v. *Huston*, 75 Ill. 343. Where one has a right to use land for certain purposes, his occupation of it must be presumed, *prima facie*, to be in accordance with his legal right. *Mowe* v. *Stevens*, 61 Me. 592. Possession of land which is merely incidental and subsidiary to the commission of a trespass thereon, as by cutting and removing the timber, and which is abandoned when that object is accomplished, although it may have continued for some weeks or months, is not such an "adverse possession" as will prevent the true owner of the land from maintaining trover or replevin for the timber thus taken. *Austin* v. *Holt*, 32 Wis. 478.

For a person holding lands in adverse possession to accept a lease from the owner of the title interrupts the running of the statute of limitations. The lease, if not void for fraud, etc., creates the relation of landlord and tenant; and during the term there can be no adverse possession by the tenant, unless by some act which would create an adverse posses-

sion if done by a tenant who entered under a lease. *Abbey Homestead Assoc.* v. *Willard*, 48 Cal. 614.

An encroachment upon a highway regularly laid out and established, by putting out a fence, or planting a hedge within the legal limits of the road, does not constitute such an adverse possession as will confer title. *McClelland* v. *Miller*, 28 Ohio St. 488; *Brooks* v. *Riding*, 46 Ind. 15.

Possession taken by a tenant under a widow of a former owner (she having no authority to give it) is not adverse to the heirs of such owner. *Melvin* v. *Waddell*, 75 N. C. 361. Where lands are devised for life to one person, with remainder over in fee to another, the possession of a third person under the tenant for life is not adverse within the meaning of the statutes of limitation, as against the remainder-man, until a right of entry accrues to him. *Carpenter* v. *Denoon*, 29 Ohio St. 379.

§ 6. **Who may acquire it.** Although it is a general rule that one who enters into possession of land in subordination to the title of another is estopped from denying that title, while he holds actually or presumptively under it, yet a trustee may disavow and disclaim his trust; a tenant, the title of his landlord, after the expiration of his lease; a purchaser, the title of his vendor after breach of his contract by the latter; and a tenant in common, the title of his co-tenant; and drive the respective owners and claimants to their action within the period of the statute of limitations. So, one who has possession of land under an agreement to purchase, which contemplates a continuing right of possession while the contract is being performed, and an absolute right of possession by virtue of its performance, may on performance deny the title of the vendor, and thereafter his possession will be adverse. *Catlino* v. *Decker*, 38 Conn. 262. See *Briggs* v. *Prosser*, 14 Wend. 227. He may always hold adversely as against all others (*Whitney* v. *Wright*, 15 Wend. 171); and if after taking possession under the contract he takes a deed from a third party, and openly claims under that, his possession becomes adverse from that time (*Jackson* v. *Johnson*, 5 Cow. 74); and if the vendor conveys to another in violation of his contract, the first vendee in possession is absolved from his relation as such, and at liberty to purchase and set up title in himself. *Logan* v. *Steele*, 7 T. B. Monr. (Ky.) 101. See *Nellis* v. *Lathrop*, 22 Wend. 121.

If a married woman, to whom possession of land is delivered under a parol gift, occupies the land uninterruptedly, adversely and exclusively as her own for fifteen years, she thereby acquires a complete title in herself subject to an estate by curtesy in her husband, provided the husband, although living with her, claims no independent, exclu-

sive occupation in himself. *Clark* v. *Gilbert*, 39 Conn. 94. The donor in such case not only knows that the possession is adverse, but intends it to be so, and there is no occasion for any notoriety. Notoriety is only important where the adverse character of the possession is to be brought home to the owner by presumption. Id.

As a general rule it may be affirmed that, if one tenant in common, joint tenant or coparcener shows that he means to hold out his co-tenants, and actually exclude them, it is an ouster, and his possession becomes adverse. *Humbert* v. *Trinity Church*, 24 Wend. 587; *Brackett* v. *Norcross*, 1 Me. 89; *Hargrove* v. *Powell*, 2 Dev. & Batt. (N. C.) 97. So though a tenant in common enter without claiming adversely to his co-tenant, his possession may afterward become adverse by notorious acts and claim of title to the whole. *Millard* v. *McMullin*, 68 N. Y. (23 Sick.) 345.

An entry or acts of possession of one of several legatees, or of one claiming under such legatee, down to the distribution of the real estate in pursuance of the will, whether with or without color or claim of title, cannot be operative toward gaining a title by adverse possession. *Ames* v. *Beckley*, 48 Vt. 395.

The grantor who conveys by a quit-claim deed may remain in possession of the property conveyed, and assert and maintain an adverse possession for the term of five years, and thus acquire a title as against the grantee, by the statute of limitations. *Dorland* v. *Magilton*, 47 Cal. 485.

One who owns 320 acres of land is not precluded thereby from acquiring and holding the actual possession of other land, and retaining the same by reason of his prior possession, as against one who enters without title. *Slaughter* v. *Fowler*, 44 Cal. 195.

The rule that one who enters upon lands under a conveyance in fee from a lessee who entered as tenant to the lessor, and that this relation being once established attaches to all who may succeed to the possession through or under the tenant immediately or remotely, and precludes them from acquiring a title hostile to that of the lessor, and from originating an adverse possession, applies only where the conventional relation of landlord and tenant exists, and some rent or return is in fact reserved, it is not applicable to one holding under an assessment lease. An adverse possession may be originated during the running of such lease, which will ripen into a title in twenty years after the end of the term. *Sands* v. *Hughes*, 53 N. Y. (8 Sick.) 287.

A mortgagor or his grantee may, by his acts and declarations, repudiate the mortgage and convert his holding into an adverse possession. *Jamison* v. *Perry*, 38 Iowa, 14. See *ante*, p. 439, § 3.

In an action by the purchaser of land at an execution sale, seeking to make a third party, who had previously purchased the land of the execution defendant, a trustee thereof against his will, his possession must be treated as adverse to that of his vendor, from the time possession is taken under the purchase sought to be avoided. *Bobb* v. *Woodward*, 50 Mo. 95.

§ 7. **Who cannot acquire it.** It is well settled that a tenant can never set up his possession as adverse to his landlord, so long as the relation of landlord and tenant continues to exist. The possession of a tenant for any assignable lapse of time is no disseizin without a tortious ouster. *Campbell* v. *Shipley*, 41 Md. 81. See *Corning* v. *Troy Iron and Nail Factory*, 34 Barb. 485; S. C., 22 How. Pr. 217. And where a tenancy exists, a purchaser who enters under an absolute conveyance in fee from the tenant is considered as entering as the tenant of the lessor, although he may not have known that his grantor held or derived his possession from the lessor. *Jackson* v. *Davis*, 5 Cow. 123. But this rule applies only where the conventional relation of landlord and tenant exists, where some rent or return is actually reserved to the former; it does not apply where the relation arises from mere operation of law, as when one makes a grant, and by the omission of the technical word "heirs," an estate for life only passes. *Jackson* v. *Harsen*, 7 Cow. 323. And a subsequent grant in fee from the landlord to the tenant will remove the disability notwithstanding a reservation of a quit-rent. *People* v. *Trinity Church*, 22 N. Y. (8 Smith) 44.

Where a tenancy from year to year is shown to have subsisted, and to be terminated by notice to quit, the possession, however long, accompanied with a claim of ownership as being entitled to a lease in fee upon rent, cannot be set up as adverse. *Van Rensselaer* v. *Van-Wie*, 23 Wend. 531. And possession under a lease for a thousand years, granted by a municipal corporation on a sale made by it for an unpaid tax or assessment, is not adverse to the owner of the fee. In such case the lessor does not claim the entire title, nor in opposition to the whole world; but, in legal effect, he is in possession, recognizing another estate to take effect after his own estate is determined. *Hoyt* v. *Dillon*, 19 Barb. 644. See *Towle* v. *Remsen*, 70 N. Y. (25 Sick.) 303, 312. No disseizin of the tenant of a particular estate and occupation under it, however long continued, will affect the right of the reversioner. *Jackson* v. *Schoonmaker*, 4 Johns. 390; *Miller* v. *Ewing*, 6 Cush. 34; *Salmon* v. *Davis*, 29 Mo. 176. Although a tenant for life attempts to convey the estate in fee, adverse possession does not commence until the death of such life tenant. *Gernet* v. *Lynn*, 31 Penn.

St. 94; *Pinckney* v. *Burrage*, 31 N. J. Law (2 Vroom) 21. See, too, *Jackson* v. *Graham*, 3 Caines, 188. And if a husband and his wife are disseized of the wife's lands, the adverse possession during the husband's life does not bar the wife or her representatives after his death. *Gregg* v. *Tesson*, 1 Black, 150. Nor will a conveyance thereof by the husband, in which she does not join, have that effect. *Munnerlyn* v. *Munnerlyn*, 2 Brev. (S. C.) 2; *Miller* v. *Miller*, 1 Meigs, 484. Where the tenant in possession of a life estate in lands, purchases of one of several *cestui que trusts* of the reversion his undivided interest thereto, and suffers the land to be sold for a municipal assessment and becomes the purchaser, he cannot hold the land for his exclusive benefit. He is bound to protect the interests of those who stand in the same relation with himself to the property, and cannot take a title to their prejudice, but the title he receives inures to the common benefit. *Burhans* v. *Van Zandt*, 7 N. Y. (3 Seld.) 523; *Bedell* v. *Shaw*, 59 N. Y. (14 Sick.) 46, 50.

A judgment debtor continuing in possession of land which has been sold under execution against him, may be presumed to hold under the title of the purchaser. *Cook* v. *Travis*, 20 N. Y. (6 Smith) 400.

A grantee in fee may hold adversely to the grantor, and there is no good reason why he should not be at liberty to deny that the grantor had any title. If he purchases and takes a conveyance in fee, he owes no fealty to the grantor, and is chargeable with no disloyalty in denying his title. He does not receive the possession under any contract, express or implied, that he will ever give it up. He takes the land to hold for himself and to dispose of it at pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title. It follows, therefore, that the grantee may set up an adverse possession against his grantor and claim the benefit of the statute of limitations under color of his conveyance. *Osterhout* v. *Shoemaker*, 3 Hill, 513; *Watkins* v. *Holman*, 16 Pet. 25.

It is a general principle that, if a mortgagee, executor, trustee, tenant for life, or any one who has a limited interest in lands, gets an advantage by being in possession or "behind the back" of the party interested in the subject, he shall not retain the same for his own benefit, but hold it in trust. *Holridge* v. *Gillespie*, 2 Johns. Ch. 30; *Baker* v. *Whiting*, 3 Sumn. (C. C.) 476. But should one of two tenants in common enter without claiming adversely to his co-tenant, and afterward purchase his co-tenant's interest under a deed from the sheriff, and then openly claim the entire title, his possession from that moment may be adverse. *Jackson* v. *Brink*, 5 Cow. 483. Though a tenant in common enter without claiming adversely to his co-tenant,

his possession may afterward become adverse by notorious acts and claim of title to the whole. *Millard* v. *McMullen*, 68 N. Y. (23 Sick.) 345. A person who holds the possession of land under a license from the owner cannot set up an adverse possession any more than one taking under a lease. *Luce* v. *Carley*, 24 Wend. 451; *Baker* v. *Mellish*, 10 Ves. Jr. 544; *Phillips* v. *Pearce*, 5 Barn. & Cres. 433. Nor can his grantee, a license not being transferable. *Babcock* v. *Utter*, 1 Abb. Ct. App. 27; S. C., 32 How. Pr. 439; 1 Keyes, 397.

Heirs who obtain exclusive possession of the lands of their ancestor cannot set up an adverse claim as against their co-heirs. *Phelan* v. *Kelly*, 25 Wend. 389.

Where a person goes into possession of land as a mere "squatter," disclaiming title, he holds as tenant at will of the true owner, and cannot, by secretly attorning to another, change the character of his possession so as to make it adverse. *Gay* v. *Mitchell*, 35 Ga. 139.

Where a party occupied land as the tenant of the owner until the death of the latter, and after that held possession in right of his wife, who was an heir of the deceased owner, during which he acquired the interest of several of the other heirs, he always recognizing their claims, it was held that his possession after the death of the owner was not adverse to the remaining heirs, but in consonance with their rights. *Busch* v. *Huston*, 75 Ill. 343. And where one, after occupying a house for several years as tenant from year to year, found no one to receive the rent for fifteen years before his death, and devised the house (with power of sale under such conditions as might be thought expedient) for the benefit of his wife and children; and his eldest son occupied the house, paying a rent to the widow for fifteen years after the death of the father, when the widow died; it was held that, notwithstanding the infirmity of the testator's title, the son could not insist on retaining possession of the house adversely to the devisees beneficially interested under the will; but that the latter were entitled to require that the property should be sold and distributed according to the directions of the testator. *Hawksbee* v. *Hawksbee*, 11 Hare, 230. It seems that if a person to whom a particular estate is given by will for his life, takes possession, and is allowed to keep, as part of that estate, something not strictly belonging to it, he cannot set up a title as gained by adverse possession against the remainder-man. *Anstee* v. *Nelms*, 1 H. & N. 225; S. C., 26 L. J. (Exch.) 5.

§ 8. **Against whom acquired.** The rule is explicit and impressive, in enforcing the duty of all courts, both in law and in equity, to render entire obedience to all the provisions of the statute of limitations; and all persons and classes are alike barred by the statute, unless there is a

saving clause in their favor. And where the statute does not in terms embrace a particular case, the court will not extend its provisions to meet it, however clearly the *reason* of the statute may comprehend it. *Bedell* v. *Janney*, 4 Gilm. (Ill.) 193; *Givens* v. *Robbins*, 11 Ala. 156; *Beardsley* v. *Southmayd*, 3 Greene (N. J.), 171; *Taberrer* v. *Brentnal*, 3 Harr. (N. J.) 262. Even though the courts of justice be shut by civil war, so that no action could be commenced or writ sued out, yet the statute of limitations has been held to continue to run. *Beckford* v. *Wade*, 17 Vesey, 87; *Duplex* v. *DeRoven*, 2 Vern. 540; *Aubry* v. *Fortescue*, 10 Mod. 206.

If an adverse possession begins to run in the life-time of and against the ancestor, it will continue to run, after his death, against the heir, notwithstanding any existing disability on the part of the latter, when the right accrues to him or her. *Fleming* v. *Griswold*, 3 Hill, 85; *Becker* v. *Van Valkenburgh*, 29 Barb. 319. And the disability that entitles the party to the benefit of the proviso — if one be made for a disability — must be existing at the time the right first accrues; so that if during the time allowed to an *infant* a subsequent disability, as *coverture*, arises, the time continues to run, notwithstanding such disability. Successive or cumulative disabilities are not within the policy, or settled and sound construction of the statute. *Demarest* v. *Wynkoop*, 3 Johns. Ch. 129; *Eager* v. *The Commonwealth*, 4 Mass. 182; *Reimer* v. *Stuber*, 20 Penn. St. 458; *Tracy* v. *Atherton*, 36 Vt. 503; *Bunce* v. *Wolcott*, 2 Conn. 27. An adverse possession commenced during the life-time of the ancestor, who was under no disability, is not affected by his death and the descent of his estate to a minor heir; nor is a disseizin, commenced when the owner was sane, affected by his subsequent insanity during the period of limitation; nor is one commenced when the owner was a *feme sole* affected by her subsequent coverture. *Becker* v. *Van Valkenburgh*, 29 Barb. 319, 324; *Allis* v. *Moore*, 2 Allen, 306; *Currier* v. *Yale*, 3 Allen, 328. But see *Wilson* v. *Kilcannon*, 4 Hayw. (Tenn.) 182; *Davis* v. *Cooke*, 3 Hawkes, 608; *Everett* v. *Whitfield*, 27 Ga. 159.

In many of the States, married women are now authorized to sue for the recovery of their lands, and in some instances, it has been held that, since the statute authorizing married women to sue, the disability of coverture is abrogated; and if the married woman was an infant, the disability of both coverture and infancy was abrogated. *Brown* v. *Cousens*, 51 Me. 301; *Thompson* v. *Cragg*, 24 Tex. 583.

Where lands are held adversely against tenants in common, one of whom is within the saving clause of the statute, on account of a disability, the rights of the others are not thereby saved. *Jackson* v. *Bradt*,

2 Caines, 169; *Marsteller* v. *McClean*, 7 Cranch, 156; *Riggs* v. *Dooley*, 7 B. Monr. 236. But see *Meese* v. *Keefe*, 10 Ohio, 362; *Thompson* v. *Gaillard*, 3 Rich. (S. C.) 418.

A wrongful continuation of possession for twenty years after the expiration of a title, under which the tenant lawfully entered, constitutes such an adverse possession as creates a bar to an entry, or to an ejectment. *Parker* v. *Gregory*, 4 N. & M. 308; S. C., 2 A. & E. 14. As, where the husband of a tenant for life held over for twenty years after her decease. Id.

A lease for years was granted to a married woman living apart from her husband, under the supposition that she was a *feme sole;* and it was held on a question, whether there had been an adverse possession, that it was not a misdirection to put it as a question, whether the possession had been adverse as against the wife, instead of as against the husband. *Roe d. Wilkins* v. *Wilkins*, 4 Ad. & E. 86; 5 N. & M. 434; S. C., 1 H. & W. 574.

§ 9. **Against whom not acquired.** Adverse possession does not give title as against the sovereign power. *Gardiner* v. *Miller*, 47 Cal. 570. So mere possession of government land, though open, exclusive and uninterrupted for twenty years, creates no impediment to its recovery by the government, or by one who within that period receives a conveyance from the government. *Oaksmith* v. *Johnston*, 92 U. S. (2 Otto) 343.

Possession of the *cestui que trust* is not adverse to the title of his trustee. *Smith d. Dennison* v. *King*, 16 East, 283.

Possession of lands acquired and held under a parol license is not adverse to that of the licensor; and an uninterrupted use for twenty years of the rights granted by the license will not prevent the licensor from revoking the license. *Babcock* v. *Utter*, 1 Abb. (N. Y.) App. Dec. 27. Where lands of a married woman are sold by her husband, the possession of the grantee does not become adverse to the wife until the marriage is terminated. *Stephens* v. *McCormick*, 5 Bush (Ky.), 181.

Where a widow continued to reside in a freehold house of which she was seized for more than twenty years after her husband's death, it was held that her possession was not adverse, except perhaps against the heir, as her possession might be intended to be in respect of dower. *Doe d. Hickman* v. *Haselwood*, 1 N. & P. 352; S. C., 6 A. & E. 167; 1 Jur. 1138; W., W. & D. 116.

An adverse possession for twenty years is no bar to the church, except as against the same incumbent who submits to it. *Runcorn* v. *Doe d. Cooper*, 8 D. & R. 450; 5 B. & C. 696. Though a lessee sets

up an adverse claim to the property in the premises which he holds under the lease, yet that does not incapacitate him from maintaining possession under the lease. *Rees d. Powell* v. *King*, Forrest, 19; S. C., 2 B. & B. 514.

§ 10. **Possession must be actual.** In determining the question of adverse possession, the jury may take into consideration the nature and situation of the land. And the placing of deeds on record, passing over the tract, employment of agents living in the neighborhood to look after it and prevent trespasses upon it, payment of taxes continuously under claim of title, and the like may be considered by them; and it is not always necessary to prove actual occupation by the claimant; but the facts referred to would not be sufficient of themselves to establish title by reason of adverse possession, unless the land was unsusceptible of more definite and actual possession, or such acts were known to the party holding the legal title and known to have been done under claim of adverse title. *Turner* v. *Hall*, 60 Mo. 271.

A claimant who relies upon possession to defeat the lien of a judgment must prove actual possession. It is not sufficient to show that he had such possession as a "deed gave," without explaining by the deed itself, or otherwise, what was the character and extent of the possession which the deed did give, or what was done under the deed, in the way of holding or using the property. *Eagle, etc., P. M. Co.* v. *Bank of Brunswick*, 55 Ga. 44. In an action to enforce a lien on property in the adverse possession of a third party, the person in possession must be made a party defendant, otherwise the judgment, as to him, is void. *Wingard* v. *Banning*, 39 Cal. 543. To acquire a right by prescription, there must be an actual enjoyment, and only that which is possessed can be so acquired. In proving a prescription, the use of the right is the only evidence of the extent to which it has been acquired. *Peterson* v. *McCullough*, 50 Ind. 35.

Claim of title, however notorious, and occasional use under that claim, without actual, continued and uninterrupted possession for twenty years, is not sufficient to bar an action of ejectment by a party having a prior right of entry. *Jones* v. *McCauley*, 2 Duv. (Ky.) 14. A general inclosure of a large tract of land is not sufficient to constitute an actual, exclusive possession of a specific parcel within it, when it appears that much of the land within the inclosure is not claimed, and much of it is in the actual occupancy of parties claiming and holding adversely. *Walsh* v. *Hill*, 41 Cal. 571. The mere fact that a person built a fence around lands is not evidence of any possession or occupation. The motive and claim under which he acted should be shown. He may have been a trespasser; or have been hired by the

owner, or have acted under a license, etc. The mere act of fencing is not evidence of an occupancy which can ripen into an adverse possession. *Russell* v. *Davis*, 38 Conn. 562. Actual possession of land may be had without fences or inclosure. *McCreery* v. *Everding*, 44 Cal. 246. The record of a survey is evidence neither of title nor possession; and marking trees around a piece of land in the forest is not of itself actual possession. *Oatman* v. *Fowler*, 43 Vt. 462. The mere cutting of timber, without actual occupation or cultivation, or inclosure of the land or some part of it, when capable thereof, will not constitute adverse possession, but will be a mere trespass. *Washburn* v. *Cutter*, 17 Minn. 361; *Rivers* v. *Thompson*, 46 Ala. 335; *Durham* v. *Holeman*, 30 Ga. 619. But cutting timber upon *uninclosed wild land may* be such an occupancy as will constitute adverse possession. *Clement* v. *Perry*, 34 Iowa, 564. The operations of building a shed, quarrying rock, erecting a lime-kiln and cutting wood, to burn it for the purpose of making lime on the land in dispute, continued uninterruptedly for more than seven years, constitute such a possession as will give a good title, to the person claiming adversely under it. *Moore* v. *Thompson*, 69 N. C. 120. But paying taxes upon a piece of land and surveying it are not acts of possession. They only show a claim of title. *Paine* v. *Hutchins*, 49 Vt. 314.

When a disseizor enters upon and cultivates part of a tract, he does not thereby hold constructive possession of the whole tract, unless his entry was by color of title by specific boundaries to the whole tract. *Ege* v. *Medlar*, 82 Penn. St. 86. So evidence of a long continued possession and claim of a part of the *locus in quo*, consisting of dry land, is no evidence of the possession of another part of the *locus in quo* covered with water, adjoining the same. *Clarke* v. *Wagner*, 74 N. C. 791.

The "constructive possession," by which one who has actual possession of a part of a tract described in a deed under which he holds, is deemed to be constructively in possession of the residue, is lost by his conveying the portion which he holds in actual possession. The grantee does not succeed to it, and the original party can no longer claim it. *Chandler* v. *Rushing*, 38 Tex. 591.

Where there is no testimony showing that it is necessary to inclose land in order to cultivate it, a party must be considered as in possession of all the land he actually cultivates. Where the party also has a contract of purchase from the State, he has the beneficial estate or interest as well as the possession, and as such equitable owner and actual possessor is entitled to enjoy all the incidents to the land and its ownership as well as the land itself. *Barnes* v. *Sabron*, 10 Nev. 217.

Where lessees of a farm embracing wild lands, under the terms of

their lease—authorizing them to cut timber from any part thereof—do in fact fell and remove timber from portions of the wild land, such acts are circumstances going to show possession of the whole tract. *Merchants' Bank* v. *Clavin*, 60 Mo. 559.

§ 11. **Must be continued.** Adverse possession, to confer title, must have been continuous throughout the period required by the statute of limitations; and an answer setting up such adverse possession must aver that it was so continuous. *Winslow* v. *Winslow*, 52 Ind. 8; *Bowman* v. *Lee*, 48 Mo. 335; *McNamee* v. *Moreland*, 26 Iowa, 96; *School Dist. No.* 8 *of Thompson* v. *Lynch*, 33 Conn. 330. If the continuity be broken, either by fraud or a wrongful entry, the protection given by the statute is lost. *San Francisco* v. *Fulde*, 37 Cal. 349. See *Den* v. *Mulford*, 1 Hayw. 320; *Den* v. *Ridley*, 2 N. C. Law Rep. 397; *Pederick* v. *Searle*, 5 Serg. & R. 240. Where there are several successive adverse occupants of real property, the last one may tack the possession of his predecessor to his, so as to make a continuous adverse possession for the time required by the statute, *provided there is a privity of possession between such occupants;* and, in case of an actual adverse possession, such privity arises from a parol bargain and sale of the possession of the premises, followed by delivery thereof, as well as by a formal conveyance from one occupant to the other. *Shuffleton* v. *Nelson*, 2 Sawyer, 540. See *Wheeler* v. *Moody*, 9 Tex. 372; *Schrack* v. *Zubler*, 34 Penn. St. 38; *Simpson* v. *Downing*, 23 Wend. 316; *Christy* v. *Alford*, 17 How. (U. S.) 601. So, actual possession by prior occupants claiming title, although having no color of title, will avail a subsequent occupant under color of title, claiming under such prior occupants, in making out a possessory title in himself. *Day* v. *Wilder*, 47 Vt. 584. The possession of a defendant in execution may be tacked to that of the purchaser (*Scheetz* v. *Fitzwater*, 5 Penn. St. 126); and in Tennessee that of an intestate to that of his administrator. *Moffitt* v. *McDonald*, 11 Humph. 457. Not so in Maine. *Bullen* v. *Arnold*, 31 Me. 583. There are, too, decisions in several States holding that the adverse possession of different occupants may be added together to make up the entire term of limitation, though not proved to be connected. *Fanning* v. *Wilcox*, 3 Day (Conn.), 258; *McCoy* v. *Dickinson College*, 5 Serg. & R. 254.

If there is an adverse possession of land, that adverse possession will be interrupted (so as to cause the statute to cease to run as against the true owner) by the true owner entering upon the land, asserting his rights, and entirely removing that which constituted the possession of the tortious possessor. And as a matter of law it is unnecessary for the

true owner to go on and show that he continued in possession. *Worssam* v. *Vandenbrande*, 17 W. R. 53, C. P.

If one enters upon, sets apart, and asserts an exclusive right to, a plat of land, as a family burial ground, for a series of years, as deaths may occur in the family of himself or his friends, it will constitute an adverse holding; actual residence upon, or continuous occupancy, in such a case, is unnecessary; but, where the possession is not under color of title, it will be confined to such parts of the land as is covered with graves. *Mooney* v. *Cooledge*, 30 Ark. 640.

When an adverse possession is such that it may be presumed that the true owner had knowledge of it and had acquiesced in it, or, if the indications of the claim and possession are so patent and so open that, if he remained in ignorance, it must have been his own fault, he will be barred, provided that the adverse possession has been continued for the requisite length of time. *Key* v. *Jennings*, 66 Mo. 365.

§ 12. **Must be visible, distinct and notorious.** A party cannot avail himself of the statute of limitations unless his possession has been in point of fact adverse to the title which he seeks to resist; and to constitute this there must be an open, visible and exclusive possession of the land in controversy, that the adverse claimant may be thus notified that his title is disputed. *Gillespie* v. *Jones*, 26 Tex. 343; *Hawk* v. *Senseman*, 6 Serg. & R. 21. The use and enjoyment of what is claimed by prescription must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the estate in, over, or out of which the easement prescribed for is claimed, and while such owner is able, in law, to assert and enforce his rights, and to resist such adverse claim if not well founded; and it must, moreover, be of something which one party could have granted to the other. *Peterson* v. *McCullough*, 50 Ind. 35; *Thompson* v. *Pioche*, 44 Cal. 508; *Crispen* v. *Hannavan*, 50 Mo. 536. The possession of a common grantor cannot be adverse as between grantees until the lines are run, or actual claim asserted. *Kellogg* v. *Mullen*, 39 Mo. 174. If two adjoining proprietors agree upon what shall constitute their division line, and each holds open, notorious and continued possession up to such line, or if one holds such possession up to such line, claiming it to be the true boundary, and the other takes no steps to disturb his possession, it is adverse, and the statute of limitations will apply. *Tamm* v. *Kellogg*, 49 Mo. 118. Vol. 1, pp. 718, 720.

Where one has the legal title, the legal seizin and possession follow; and any one setting up or claiming under an adverse possession must show that he, or those under whom he claims, have had the open, notorious and continued adverse possession, under claim of right and color

of title, for the period limited by the statute. *Bradley* v. *West*, 60 Mo. 33.

Where a person is in possession of land, under a deed duly recorded, his possession is deemed to be co-extensive with the boundaries defined in the deed. *Wilson* v. *Williams*, 52 Miss. 487.

Evidence of a fence built merely for convenience in working a farm, and not for the purpose of marking boundaries according to title, is of no weight in determining acts of possession; but a fence built for the purpose of notifying all interested that the party claims to that line, and his acts of cultivation within it are done under that claim, is a strong circumstance to show occupation. *Soule* v. *Barlow*, 49 Vt. 329.

Where a party conveys land by deed, and for twenty years thereafter holds open, notorious, exclusive and adverse possession of such lands, he thereby re-acquires title to the lands as effectually as if they had been reconveyed to him. *Traip* v. *Traip*, 57 Me. 268.

§ 13. **Must be adverse or hostile.** In order that title to land may be gained by possession, the possession must be not only exclusive but adverse, and the adverse character of the possession must be proved to the satisfaction of the jury like any other fact. It cannot be assumed, as matter of law, from mere exclusive possession however long continued. *Russell* v. *Davis*, 38 Conn. 562; *Grube* v. *Wells*, 34 Iowa, 148; *Musick* v. *Barney*, 49 Mo. 458; *Carroll* v. *Gillion*, 33 Ga. 539. A survey unaccompanied by any other act of user and occupation is not such a distinct and notorious act of possession as will justify the reasonable presumption of an ouster, or that the party went upon the land with a palpable intent to claim the possession as his own. *Beatty* v. *Mason*, 30 Md. 409. Splitting rails, cutting timber, etc, is not such adverse and hostile possession as will ripen into title. *Carrol* v. *Gillian*, 33 Ga. 539. The law presumes that, where title is shown, the true owner is in possession until adverse possession is proved to begin. It does not begin until an actual entry is made, accompanied by a claim of title hostile to that of the true owner, and to bar a right of entry it must be continuous for the statutory period. *Miner* v. *Mayor, etc., of New York*, 5 Jones & Sp. (N. Y.) 171; *Thomas* v. *Babb*, 45 Mo. 384. Where owners of adjoining lands erroneously locate a line fence, twenty years' occupation up to such fence is sufficient adverse possession to enable the person whose deed does not cover the land to hold the same. *Robinson* v. *Phillips*, 1 T. & C. (N. Y.) 151; S. C., 65 Barb. 418; S. C. affirmed, 56 N. Y. (11 Sick.) 634. To make the possession of a party a bar in the action of ejectment, strict proof is necessary that it was hostile in its inception. *Brandt* v. *Ogden*, 1 Johns. 156; *Gay* v.

*Moffit*, 2 Bibb, 507; *McGee* v. *Morgan*, 1 A. K. Marsh. 62. See *Jackson* v. *Birner*, 48 Ill. 203.

In all cases where a party is in possession of lands in privity with the rightful owner, nothing short of an open and explicit disavowal and disclaimer of a holding under that title, and assertion of title in himself, brought home to the owner, will satisfy the law. *Floyd* v. *Mintsey*, 7 Rich. (S. C.) 181.

# CHAPTER VI.

## ALIEN AND ALIENAGE.

### ARTICLE I.

#### OF ALIENAGE IN GENERAL.

**Section 1. Definition and nature.** As distinguished from a subject or citizen, an alien is a person born in another or foreign country, or out of the allegiance or jurisdiction of the government as to which his *status* is to be determined. 2 Kent's Com. 40; *Ainslie* v. *Martin*, 9 Mass. 456; *Lynch* v. *Clarke*, 1 Sandf. Ch. 583; S. C., 3 N. Y. Leg. Obs. 236. But not all who come within the terms of this general definition are aliens, for, by English law, the children of public ministers in foreign countries, and of other British subjects residing abroad, but still retaining their allegiance to their sovereign, are subjects and not aliens; and by the laws of the United States, all persons born here, and not subject to any foreign power, except Indians not taxed, and all children born out of the jurisdiction whose fathers were citizens at the time of their birth, are citizens. U. S. Rev. Stat., ed. of 1874, p. 351; *Ludlam* v. *Ludlam*, 31 Barb. 486; S. C. affirmed, 26 N. Y. (12 Smith) 356; *Davis* v. *Hall*, 1 N. & M. (So. Car.) 292.

The revolution of 1776 changed the *status* of persons previously born here, or then residing here as British subjects; those adhering to the mother country, as well as all other British subjects becoming aliens to us, while those withdrawing from that allegiance and remaining here, became American citizens, but aliens to Great Britain. *Dawson* v. *Godfrey*, 4 Cranch, 321; *Fairfax* v. *Hunter*, 7 id. 603; *Inglis* v. *Sailors' Snug Harbor*, 3 Pet. 99; *Hollinsworth* v. *Duane*, Wall. Sr. 51; *Kilham* v. *Ward*, 2 Mass. 236.

The rights of citizenship cannot descend to persons whose *fathers* never resided in the United States. Neither can they be enjoyed by persons proscribed by any State, or legally convicted of joining the British army during the revolutionary war, or those who avoided the draft, or deserted from the army during the late rebellion.

In the United States liberal provisions are made by statute for the naturalization of any and all resident aliens, except aliens of African

descent, and those who are subjects of foreign governments at war with this government. U. S. Rev. Stats. 1874, p. 380 *et seq.* Such naturalization relieves them, and their minor children resident here, of nearly all the disabilities of alienage. Even the initial proceeding, that of making a declaration of intention to become a citizen, is, by the laws of many of the States, made sufficient to entitle them to a majority of the rights of citizens, including the right of suffrage, within the limits of such States.

§ 2. **Common-law rights as to land.** At common law, an alien could acquire a defeasible title to land by devise or purchase; but he could take no title by mere operation of law, as under the laws of descent, of dower or of curtesy. 2 Kent's Com. 54; *Hunt* v. *Warnicke*, Hardin (Ky.), 66; *Stevenson* v. *Dunlap*, 7 Monr. 143; *Wadsworth* v. *Wadsworth*, 12 N. Y. (2 Kern) 376; *Reese* v. *Waters*, 4 Watts & S. 145; *Paul* v. *Ward*, 4 Dev. (N. C.) 249; *Mooers* v. *White*, 6 Johns. Ch. 360; *Williams* v. *Wilson*, Mart. & Yerg. (Tenn.) 248; *Vaux* v. *Nesbitt*, 1 McCord's Ch. 352, 370; *Foss* v. *Crisp*, 20 Pick. 121; *Trezevant* v. *Osborn*, 3 Brev. (S. C.) 29; *Mussey* v. *Pierre*, 24 Me. 559; *Collingwood* v. *Pace*, 1 Vent. 417; *Marshal* v. *Conrad*, 5 Call (Va.), 364.

But though he could take land under a devise or grant, and could hold it as against all other claimants, yet his title was at all times liable to be divested by the sovereign or State, and that liability followed it even into the hands of his grantee. Such title was, therefore, good only until declared forfeited to the government by inquest of office found. *McCreery* v. *Allender*, 4 Har. & McH. (Md.) 409; *University* v. *Miller*, 3 Dev. (N. C.) 191; *Craig* v. *Leslie*, 3 Wheat. 589; *Doe* v. *Robertson*, 11 id. 332; *Bradstreet* v. *Supervisors*, 13 Wend. 546; *Munro* v. *Merchant*, 28 N. Y. (1 Tiff.) 9; *Scanlan* v. *Wright*, 13 Pick. 523; *Cross* v. *De Valle*, 1 Wall. 1; *Montgomery* v. *Dorion*, 7 N. H. 475; *Smith* v. *Zaner*, 4 Ala. 99; *Cross* v. *De Valle*, 1 Wall. 5; *Norris* v. *Hoyt*, 18 Cal. 217; *Harley* v. *State*, 40 Ala. 689. The same disabilities also attached to aliens in respect to uses and trusts arising out of real estate. A title to land held in trust for an alien was subject to be divested, the same as if held by him in his own name, and the trust could not be enforced. *Hammekin* v. *Clayton*, 2 Woods, 336; *Atkins* v. *Kron*, 5 Ired. Eq. 207.

As he could not acquire a perfect title by grant or devise, neither could he convey one to his grantee. Having no inheritable blood, he could no more transmit land by descent to others, than he could take it himself; and alienage in any mediate ancestor would interrupt the descent between persons who were themselves capable of

taking and transmitting land by descent. *Levy* v. *McCartee*, 6 Pet. 102, 113.

Aliens are not within the terms "heirs at law," and though they may be nearest of kin to an intestate, his estate will pass to his relatives who are citizens, or escheat to the State. *Orr* v. *Hodgson*, 4 Wheat. 453; *Jackson* v. *Jackson*, 7 Johns. 214; *Halyburton* v. *Kershaw*, 3 Dessaus. 106; *Heeney* v. *Brooklyn Benev. Soc.*, 33 Barb. 360; S. C. affirmed, 39 N. Y. (12 Tiff.) 333. If an alien dies seized of lands, without heirs capable by law of taking them by descent, the freehold cannot be kept in abeyance, and the title, therefore, falls to the government, without office found. *Slater* v. *Nason*, 15 Pick. 345; *Trustees* v. *Gray*, 1 Litt. 149; *Stevenson* v. *Dunlap's Heirs*, 7 Monr. 134; *Fry* v. *Smith*, 2 Dana, 38; *Collingwood* v. *Pace*, 1 Sid. 193; *Stokes* v. *Dawes*, 4 Mason (C. C.), 268; *White* v. *White*, 2 Mete. (Ky.) 185; *Hinkle's Lessee* v. *Shadden*, 2 Swan (Tenn.), 46.

If the possession is left vacant, the title and possession both vest immediately in the government; and though it is still subject to any valid liens created by the owner, and to any valid debts contracted by him, the title of the government cannot be divested by a judicial sale in a proceeding to which the government is not a party. *Sands* v. *Lynham*, 27 Gratt. 291; S. C., 21 Am. Rep. 348.

These principles of the common law still prevail in some of the American States, but in most of them are greatly modified by statute, if not altogether abrogated.

§ 3. **Rights under treaties.** These disabilities of aliens, as fixed by the common law, may of course be removed by the governments recognizing that law, either by statute or by treaty. Among the provisions of treaties made between this and other countries are many intended to mitigate the severity of that law. Such a provision in the treaty of 1782, between the United States and the Netherlands, enables the subjects of the latter government to inherit real estate in this country, without naturalization. *University* v. *Miller*, 3 Dev. (N. C.) 188.

The treaty of 1783, between the United States and Great Britain, contained a provision protecting the existing titles of British subjects to lands here, which would otherwise have been liable to forfeiture for alienage (*Orr* v. *Hodgson*, 4 Wheat. 453); and this has been held to apply to those held by English corporations. *Society for Propagation, etc.* v. *New Haven*, 8 Wheat. 464. But it had no effect upon estates which had already been confiscated and the confiscation perfected by inquest and lapse of time. *Commonwealth* v. *Bristow*, 6 Call (Va.), 60. The subsequent treaty of 1794 gave the subjects of either government the

right to hold lands within the territories of the other; and not only protected existing titles to lands here, then held by British subjects, but made them heritable by their heirs. Actual possession by the alien at the date of the treaty was not made essential. It has been construed to apply to vested remainders as well as to estates in possession; and is held not to have been annulled by the war of 1812. *Fox* v. *Southack*, 12 Mass. 143; *Harden* v. *Fisher*, 1 Wheat. 300; *Hughes* v. *Edwards*, 9 id. 489; *Stephen* v. *Swann*, 9 Leigh (Va.), 404; *Duncan* v. *Beard*, 2 N. & M. (So. Car.) 400; *Megrath* v. *Robertson*, 1 Desaus. (S. C.) 449.

That treaty did not, however, save to the heirs of one who came after the treaty of 1783, and died before that of 1794, the title to lands of which he became possessed while here and died seized. *Blight* v. *Rochester*, 7 Wheat. 545. Nor did it remove the disability of alienage as to subsequently-acquired lands. *Jackson* v. *Decker*, 11 Johns. 418.

It has been held that these treaties have for their object merely the security of British subjects in the disposition of their real property, and could not have in view any privilege of aliens to succeed as heirs to the estates of American citizens. *Love* v. *Hadden*, 3 Brevard, 1; *Orser* v. *Hoag*, 3 Hill, 79.

The treaty of 1778, between the United States and France, removed the disability of alienage as between citizens of the two countries, by allowing citizens of either to hold lands in the other, and dispose of the same, and to inherit without being naturalized; and it is held that a title once vested in a French subject in lands in this country was not divested by the abrogation of that treaty, and the expiration of the subsequent convention of 1800. *Carneal* v. *Banks*, 10 Wheat. 181; *Chirac* v. *Chirac*, 2 id. 259.

These provisions by treaty constitute a part of the supreme law of the land (U. S. Const., Art. 6, § 2), and are binding upon the several States.

§ 4. **Rights under statutes.** The laws of the United States extend to aliens certain rights. Among these is the right, after declaring their intention to become citizens, of pre-empting public lands, or entering them as homesteads. U. S. Rev. Stats. of 1874, pp. 417–422. And any alien who is domiciled here, or is a resident of a foreign country which grants similar privileges to American citizens, may obtain protection for his lawful trade-marks, or patents for his inventions here.

But the right to extend privileges to aliens is not confined to the Federal government alone. Any State may confer upon them the right to take lands by descent, within its own territory. *Montgomery* v. *Dorion*, 7 N. H. 475. Or it may by its grant of lands to an alien con-

fer a title which will descend to his heirs, though they may be non-resident aliens. *Commonwealth* v. *Heirs of Andre*, 3 Pick. 224; *Goodell* v. *Jackson*, 20 Johns. 707. Or it may authorize them to hold lands, with or without restrictions as to leasing or conveying. *Jackson* v. *Britton*, 4 Wend. 507; *Ellice* v. *Winn*, 12 id. 342; *Aldrich* v. *Manton*, 13 id. 458. And, accordingly, statutes of that character have been enacted in nearly all of the States, conferring rights more or less restricted. *Spratt* v. *Spratt*, 1 Pet. 343; *Jackson* v. *Adams*, 7 Wend. 367; *Duke of Cumberland* v. *Graves*, 7 N. Y. (3 Seld.) 305. And see *Howard* v. *Moot*, 64 N. Y. (19 Sick.) 262. Of these restrictions, the most common relate to length of residence, intention to become citizens, or the eventual citizenship of those to whom such rights are accorded. *Trustees* v. *Gray*, 1 Litt. (Ky.) 149; *Piper* v. *Richardson*. 9 Metc. 155; *Meeks* v. *Richbourgh*, 1 Rep. Con. Ct. 411.

The common-law doctrines on this subject now prevail in very few, if any, of the States. In Florida, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, Ohio, Pennsylvania, and Wisconsin, they have been entirely abrogated, and aliens may purchase, hold, inherit, and transmit property, the same as native born citizens. In Connecticut, Mississippi, and New Hampshire, the only condition of enjoying those rights is residence; while California requires a non-resident alien to whom an inheritance falls to come and claim it within five years; and Missouri requires that an alien heir, residing in another of the United States, shall have declared his intention to become a citizen, in order to entitle him to inherit. See *Wacker* v. *Wacker*, 26 Mo. 426; *Siemssen* v. *Bofer*, 6 Cal. 250. In Georgia, Rhode Island, Tennessee, and Texas, resident aliens may purchase and convey lands, if they have declared their intentions to become citizens; and so they may in Alabama, Arkansas, and Delaware, but in the latter States, to take by descent, they must be residents of the United States at the death of the intestate. In Kentucky aliens enjoy the most of the rights of citizens, but two years' residence is necessary to enable them to inherit lands. *Beard* v. *Rowan*, 1 McLean (C. C.), 135; *White* v. *White*, 2 Metc. (Ky.) 185; *Yeaker* v. *Yeaker*, 4 id. 33; *Eustache* v. *Rodaquest*, 11 Bush, 42; *Dudley* v. *Grayson*, 6 Monr. 260. Virginia permits aliens to hold land for twenty years, for residence, trade or manufacture. By an act of 1779, that State allowed aliens to take patents for land during the time within which he was required to become a citizen; confirming the title if he afterward became such citizen. It also secured from escheat lands acquired by aliens under statutes preceding the patent, yet left them in other respects under the ordinary alien disabilities. *Elmendorff* v. *Carmichael*, 3 Litt. (Ky.) 475; *Doe* v. *Robertson*, 11

Wheat. 332. Subsequent statutes, protecting purchasers of such lands before escheat to the State, are held to extend to equitable as well as to legal estates. *Robertson* v. *Miller*, 1 Brock. (C. C.) 466. An alien enemy could, in that State, take lands by devise, and it has been held that a British subject to whom such a devise was made in 1781, could, by the treaty of 1794, hold and alien the lands so devised. *Stephen* v. *Swann*, 9 Leigh (Va.), 404.

A South Carolina statute of 1807 permitted aliens, who had declared their intentions to become citizens, to take lands by grant, and lands held by them might be conveyed, devised or distributed to their children, grand-children, or other relations, who should, within one year after the death of the owner, become residents of the State, and as soon as allowed by law, become citizens. *Richards* v. *McDonald*, 2 Rep. Con. Ct. 18.

An English statute, held in 1824 to be still in force in Maryland, removing the disability as to claiming title by descent through an alien ancestor, is held to merely put the claimant in the same position as he would be if his ancestor had not been an alien; and not to apply to the case of a living alien ancestor, so as to create a title by heirship where by common law it would not exist if the ancestor was a natural born subject. *McCreery* v. *Somerville*, 9 Wheat. 354. The same construction has been put upon a similar statute in Texas. *McKinney* v. *Saviego*, 18 How. (U. S.) 235.

A Maryland statute of 1791, allowing foreigners to hold lands, is held to be a mere enabling act, applicable only to those who could not otherwise take. Lands purchased there by an alien before naturalization can be held under that law, and transmitted to his alien heirs and relations, even after he becomes a citizen; but those purchased by him after naturalization are held by him as a citizen, and cannot be so transmitted. *Spratt* v. *Spratt*, 1 Pet. 343; S. C., 4 id. 393. The subsequent statute of 1813 is held not to authorize a female alien, who never resided in the United States during coverture to be endowed, or to inherit from her husband. *Buchanan* v. *Deshon*, 1 Harr. & Gill (Md.), 280.

New York permits aliens who have declared their intention to become citizens, and taken the oath as to actual residence, etc., required by statute, to take and hold lands to them and their assigns. Length of residence alone does not, in that State, entitle an unnaturalized alien to inherit lands, nor enable a person to deduce title through an alien ancestor still living. *Kennedy* v. *Wood*, 20 Wend. 230; *People* v. *Irvin*, 21 id. 128. An act of 1827, investing certain persons with heritable blood and power of transmitting to next of kin, is held not to permit their estates to go to next of kin who are aliens. *Parish* v. *Ward*, 28

Barb. 328. But see *McCarty* v. *Terry*, 7 Lans. 236; *Ettenheimer* v. *Heffernan*, 66 Barb. 374. An act of 1845 enabled children of deceased resident aliens to inherit their lands, though themselves non-resident aliens, but the title of male heirs who were of full age was defeasible by the State, unless they declared their intention to become citizens before the institution of proceedings to forfeit them. *Goodrich* v. *Russell*, 42 N. Y. (3 Hand) 177. See *Dusenberry* v. *Dawson*, 9 Hun (N. Y.), 511; *Hall* v. *Hall*, 13 id. 306. By recent statutes, resident aliens can take by descent from their parents, and the title of citizens is not affected by the alienage of former owners.

A New Jersey statute of 1817 enables the children born in this country, of a person who purchased land in that State while an alien enemy, and continued to hold it after that date, and after he became an alien friend, to inherit from him, and his widow to take dower in such land. *Yeo* v. *Mercereau*, 3 Harr. (N. J.) 387.

Under the statutes of Indiana, as they formerly existed, an alien could not inherit land from an ancestor not fully naturalized, but the rule has been changed, and an alien may now inherit. *Eldon* v. *Doe*, 6 Blackf. (Ind.) 341; *Murray* v. *Kelly*, 27 Ind. 42. Aliens who have declared their intention can hold lands in the territory of *Montana Territory* v. *Lee*, 2 Mont. 124.

Alienage of an ancestor is now no bar to a title by descent through him in a majority of the States.

Although aliens may be under disability as to land, yet resident aliens are usually permitted to inherit personal property. *Greenheld* v. *Morrison*, 21 Iowa, 538; *Polk* v. *Ralston*, 2 Humph. 537.

§ 5. **Personal disabilities.** Under the laws of the United States governing the registry of vessels, an alien cannot be master of an American vessel. *The Dubuque*, 2 Abb. (U. S.) 20. Those laws also provide that aliens who are here after a declaration of war between this and their native country shall be liable to be removed by this government but they will be allowed a reasonable time to remove their goods, which time is in some cases fixed by treaty. U. S. Rev. Stats. of 1874, p. 789.

As a general rule, an alien cannot vote at a public election, but the charters of municipal corporations sometimes permit resident aliens, otherwise qualified, to vote for municipal officers (*Stewart* v. *Foster*, 2 Binn. 120), and in many of the American States, aliens are permitted to vote after making their declarations of intention to become citizens. It seems that a member of a religious society or other private corporation may vote at a corporate election, although an alien, unless there is something in the law under which it is organized expressly or impliedly

excluding him. *Commonwealth* v. *Woelper*, 3 Serg. & R. 29; *Matter of Barker*, 6 Wend. 509.

Nor is an alien eligible to a public office; though it has been held that, if he becomes fully naturalized before the commencement of a term for which he has been elected, he may take and hold it. *Walther* v. *Rabolt*, 30 Cal. 185; *State ex rel. Off* v. *Smith*, 14 Wis. 497; *State ex rel. Schuet* v. *Murray*, 28 id. 96; 9 Am. Rep. 489. Nor is he generally a competent juror, until he has become fully naturalized. *Schumaker* v. *State*, 5 Wis. 324; *Byrne* v. *State*, 12 id. 519; *Grubb* v. *State*, 14 id. 434; *Borst* v. *Becker*, 6 Johns. 332. But the objection, to avail, must be raised before verdict. *Hollingsworth* v. *Duane*, 4 Dall. (Penn.) 353; *State* v. *Quarrell*, 2 Bay (S. C.), 150; *Siller* v. *Cooper*, 4 Bibb, 90. Alienage is not, however, good ground of challenge to a juror in the District of Columbia. *Mima, Queen*, v. *Hepburn*, 2 Cranch (C. C.), 3.

An alien cannot gain a settlement under the pauper laws. *Knox* v. *Waldoborough*, 3 Me. 455; *Jefferson* v. *Litchfield*, 1 id. 196. He cannot by intermarriage with a female citizen obtain control of her lands. *Fitzgerald* v. *Garvin*, Charlt. (Ga.) 255.

Although alienage of the vendee is not a sufficient ground for rescinding a contract for the sale of lands, at the suit of the vendor, yet, it is sufficient to prevent a decree for specific performance in favor of the vendee. *Hepburn* v. *Dunlop*, 1 Wheat. 197; *Orr* v. *Hodgson*, 4 id. 453.

A contract with an alien, relative to personal property, is lawful and valid; but one with an alien enemy is unlawful, unless made under a license of the government. A ransom bond, however, is valid. *Crawford* v. *The William Penn*, 3 Wash. (C. C.) 484.

An alien residing in the State of New York is not within the provision of the statute which requires non-residents to give security for costs in actions brought by them unless such residence is shown to be merely temporary. *Norton* v. *MacKie*, 8 Hun (N. Y.), 520.

An alien is, in general, incompetent to devise real estate; but an alien friend does not labor under any disability in regard to executing wills of personal estate. Alien enemies are incapable of making a valid will even of personalty, unless by force of special license from the national government to reside and transact business within our jurisdiction during the continuance of hostilities. 1 Redf. on Wills, 7.

§ 6. **Ownership of personal property.** An alien may acquire, hold and transmit personal property, the same as a citizen; and he may take mortgage security for a debt. See *Hughes* v. *Edwards*, 9 Wheat. 489. As we have before seen, he may take such property by descent.

He may also take it by bequest; and if a provision in a will of real estate, making him a beneficiary, can be construed as effecting an equitable conversion, he can take under it as a bequest of personal estate. *Craig* v. *Leslie*, 3 Wheat. 563.

§ 7. **Capacity to sue.** An alien, who holds land under a special State law, may maintain a suit in respect thereto in a United States court. *Bonaparte* v. *Camden, etc., R. R. Co.*, I Bald. (C. C.) 216. The right of an alien to sue in a United States court is not lost by his residing in one of the States. *Breedlove* v. *Nicolet*, 7 Pet. 413. An alien enemy cannot sue in a court of the United States, nor can he sustain a claim in a prize court. *Mumford* v. *Mumford*, 1 Gallis. (C. C.) 366; *The Emulous*, id. 563.

In some of the States an alien friend is permitted to maintain an action for the recovery of lands conveyed to him, although his title is defeasible by the State, or for rent reserved in a lease thereof. *Ellice* v. *Winn*, 12 Wend. 342; *Bradstreet* v. *Supervisors*, 13 id. 546; *Overing* v *Russell*, 32 Barb. 263; *Ford* v. *Harrington*, 16 N. Y. (2 Smith) 285; *Rouche* v. *Williamson*, 3 Ired. (N. C.) 141. But a non-resident alien cannot generally maintain ejectment as heir at law. *Ennas* v. *Franklin*, 2 Brev. (S. C.) 398; *Siemssen* v. *Bofer*, 6 Cal. 250.

As an alien can acquire title to personal property, he can also maintain suits for its recovery and protection; and if he takes mortgage security for a debt, he can foreclose the mortgage in equity. An alien friend can bring here any personal action for injury to his person or property which a citizen can. *Taylor* v. *Carpenter*, 2 Woodb. & M. 1; *Coffeen* v. *Brunton*, 4 McLean, 516. And one alien may sue another in our courts, on a contract made abroad, or for a tort committed abroad, if the parties are within the jurisdiction. *Roberts* v. *Knight*, 7 Allen, 449; *Dewitt* v. *Buchanan*, 54 Barb. 31.

A citizen may sue an alien here, even during war between this country and his own, for the protection of his property or rights, whenever the defendant can be reached by process. *Masterson* v. *Howard*, 18 Wall. 99; *DeJarnett* v. *DeGiverville*, 56 Mo. 440. But an alien enemy cannot sue in the hostile country during the war, unless he continues to reside there with the permission of the government, or upon a contract sanctioned by the government. 1 Kent's Com. 67; *Bell* v. *Chapman*, 10 Johns. 183; *Clarke* v. *Morey*, id. 69; *Jackson* v. *Decker*, 11 Johns. 418; *Wells* v. *Williams*, 1 Ld. Raym. 282; *Russell* v. *Skipwith*, 6 Binney, 241; *Burnsides* v. *Matthews*, 54 N. Y. (9 Sick.) 78. But, if the right of action accrued before the alien became an enemy, the remedy is merely suspended during the war. *Sands* v. *N. Y. L.*

*Ins. Co.*, 50 N. Y. (5 Sick.) 626; S. C., 10 Am. Rep. 535; *Robinson* v. *International Law Ass. Soc.*, 42 N. Y. (3 Hand) 54; S. C., 1 Am. Rep. 490; *Martine* v. *Same*, 62 Barb. 181. The same rules apply to citizens of States at war with the United States, as to foreign enemies. *Sanderson* v. *Morgan*, 39 N. Y. (12 Tiff.) 231; *Bonneau* v. *Dinsmore*, 23 How. (N. Y.) 397.

If the plaintiff became an enemy after judgment, the court will not, on motion, stay or set aside the execution (*Buckley* v. *Lytle*, 10 Johns. 117); and if a writ of error is pending at the time war is commenced, the judgment may nevertheless be affirmed. *Owens* v. *Hanney*, 9 Cranch, 180. But if the alien plaintiff resides in a country at peace with ours, the plea of alien enemy will not avail. *Baby* v. *Dubois*, 1 Blackf. (Ind.) 255.

§ 8. **Liability to be sued.** An alien found within the jurisdiction of our courts is liable to be sued therein on his contracts wherever made. *Barrell* v. *Benjamin*, 15 Mass. 354. This is believed to be the general rule, though the contrary is held in some cases. See *Dumoussay* v. *Delevit*, 3 Harr. & McH. (Md.) 151; *Brinley* v. *Avery*, Kirby (Conn.), 25.

Even an alien enemy may be sued here. *Russ* v. *Mitchell*, 11 Fla. 80. And he may employ counsel to defend in such suit. *McNair* v. *Toler*, 21 Minn. 175. And though sued as a non-resident, and beyond reach of service of process by publication, because within the hostile lines, he will be bound by the judgment. *Dorsey* v. *Thompson*, 37 Md. 25.

# CHAPTER VII.

## ALTERATION OF INSTRUMENTS.

### ARTICLE I.

#### OF ALTERATION IN GENERAL.

**Section 1. Definition and nature.** In general terms an alteration of an instrument is something by which its meaning or language is changed, either in a material, or in an immaterial particular. If what is written upon or erased from the paper containing an instrument has no tendency to produce this result, nor to mislead any person, it will not be an alteration. *Morrill* v. *Otis*, 12 N. H. 466. An alteration may be made by the agreement of the parties to the instrument; or by a party entitled under it without the consent of the other party; or by a stranger to the instrument. But in its strictness, the term "alteration" is to be distinguished from the act of a stranger in changing the form or language of the instrument which is called a *spoliation*. *Bridges* v. *Winters*, 42 Miss. 135; S. C., 22 Am. Rep. 598. This distinction is not, however, always observed in practice.

It is a principle of universal application that the material alteration of a written instrument renders it void. *Angle* v. *North-Western Mut. Ins. Co.*, 2 Otto, 330.

§ 2. **Its general effect.** The general effect of a willful and material alteration of a written instrument, made by one of the parties to it after execution, and without the authority or consent of the other party, is, to defeat any rights he would otherwise have under it (*Wright* v. *Wright*, 2 Halst. [N. J.] 175; *Tillou* v. *Clinton, etc., Mut. Ins. Co.*, 7 Barb. 564; *Burnham* v. *Ayer*, 35 N. H. 351; *Newill* v. *Mayberry*, 3 Leigh [Va.], 250; *Marcy* v. *Dunlap*, 5 Lans. [N. Y.] 365; *Davis* v. *Coleman*, 7 Ired. [N. C.] L. 424); unless it be explained. *Williams* v. *Starr*, 5 Wis. 534. And where an agreement is reduced to writing, whether under seal or not, so as to merge the original promise and the written agreement is so altered as to avoid it, the party cannot resort to the original contract. *Mills* v. *Starr*, 2 Bailey (S. C.), 359; *Wheelock* v. *Freeman*, 13 Pick. 165; *Smith* v. *Mace*, 44 N. H. 553; *Meyer* v. *Huneke*, 55 N. Y. (10 Sick.) 412.

But an alteration which does not vary the meaning of an instrument does not avoid it though made by the party claiming under it. *Nichols* v. *Johnson*, 10 Conn. 192; *Pequawket Bridge* v. *Mathes*, 8 N. H. 139. The doctrine that any material alteration beneficial to the party making the alteration will vitiate the instrument is said to be founded on a presumption of fraud; and the alteration must be such as to effect some change in the meaning or legal operation of the instrument. *Huntington* v. *Finch*, 3 Ohio St. 445. And see *Moye* v. *Herndon*, 30 Miss. 110.

§ 3. **Alteration before delivery.** That the alteration of an instrument made before delivery does not affect the validity of it, see *Wickes* v. *Caulk*, 5 Harr. & J. (Md.) 36; *Ravisies* v. *Alson*, 5 Ala. 297. So held of a bond. See *Downes* v. *Richardson*, 5 B. & Ald. 674, 681. But it is held that a material alteration of a note, made by one of the promisors before its delivery without the knowledge of the other promisor, makes the note void as against the other promisor, although the alteration is made without the knowledge of the payee and without fraudulent intent. *Draper* v. *Wood*, 112 Mass. 315; S. C., 17 Am. Rep. 92. See *post*, p. 485, Art. 6.

§ 4. **Alteration by consent.** An alteration of an instrument made by the *consent of parties* does not invalidate the instrument (*Camden Bank* v. *Hall*, 2 Green's [N. J.] L. 583; *Smith* v. *Weld*, 2 Penn. St. 54; *Hills* v. *Barnes*, 11 N. H. 395; *Collins* v. *Collins*, 51 Miss. 311; S. C., 24 Am. Rep. 633, 639); and such consent may be *implied* from circumstances, custom, the nature of the alteration, etc. (*Ogle* v. *Graham*, 2 Penr. & W. [Penn.] 132; *Hale* v. *Russ*, 1 Me. 334); at least, where the alteration is immaterial. See id.; *Woodworth* v. *Bank of America*, 19 Johns. 391. And it has been held that an alteration, even in a material part, and after execution, may be made, if it is proved, or may be presumed to have been done by consent of all parties. *Woolley* v. *Constant*, 4 Johns. 54; *Barrington* v. *Bank of Washington*, 14 Serg. & R. (Penn.) 405; *Richmond Manuf. Co.* v. *Davis*, 7 Blackf. (Ind.) 412; *Speake* v. *United States*, 9 Cranch, 28. The parties must, however, be at that time legally competent to consent. *Moore* v. *Bickham*, 4 Binn. (Penn.) 1. And it is held in Connecticut that a *material* alteration, even by consent of parties, after execution and acknowledgment before a magistrate, will be inoperative, without a re-acknowledgment (*Coit* v. *Starkweather*, 8 Conn. 289); though it is otherwise as respects an *immaterial* alteration. Id. In Pennsylvania, not the smallest alteration, even by consent, can be made after acknowledgment, without there be a re-acknowledgment. *Moore* v. *Bickham*, 4 Binn. 1. In England, if the alteration be made with the consent of all the parties to the instrument,

still, as it thereby becomes a new contract, the old stamp will not suffice (*Bowman* v. *Nicholl*, 5 T. R. 537); unless, indeed, the alteration was merely to correct a mistake, and so render the instrument what it was originally intended to have been. *Byrom* v. *Thompson*, 11 Ad. & El. 31; *Cariss* v. *Tattersall*, 3 Scott (N. R.), 257; S. C., 2 M. & G. 890; 1 Sm. Lead. Cas. 957. An alteration of a note made with the assent of a party with a view to its immediate discount, but upon the agreement that the consent of another party to it, then absent, shall be subsequently obtained, does not, such consent not having been obtained, render the note so negotiated invalid against the assenting party. *Stoddard* v. *Penniman*, 113 Mass. 386.

§ 5. **Filling blanks.** It may be deemed as pretty well settled by the authorities that where a party, intending to enter into an obligation, signs the paper in blank, entirely, or as to any particular, there is an implied authority to any holder to fill all blanks, at his discretion, in general conformity to the character of the paper, without vitiating it. *Bank of Commonwealth* v. *McChord*, 4 Dana (Ky.), 191; *Page* v. *Morrel*, 3 Abb. Ct. App. (N. Y.) 433; S. C., 33 How. 244; 3 Keyes, 117; *Spitler* v. *James*, 32 Ind. 202; S. C., 2 Am. Rep. 334; *Hardy* v. *Norton*, 66 Barb. 527; *Yocum* v. *Smith*, 63 Ill. 321; S. C., 14 Am. Rep. 120; *McGrath* v. *Clark*, 56 N. Y. (11 Sick.) 34; S. C., 15 Am. Rep. 372. See *Holmes* v. *Trumper*, 22 Mich. 427; S. C., 7 Am. Rep. 661, 669, *n*. But where the character, or legal tenor and effect of the instrument is changed, parties not consenting are discharged. Id. Thus, where a person signs, as drawer, a form of a bill of exchange, blank as to the names of the drawee and payee, the date, the amount, and the place where payable, and delivers it to another, at the request and for the accommodation of the latter, and it is afterward filled up as a promissory note, without the knowledge or consent of such signer, he is released from liability as maker or surety upon the note in the hands of the person chargeable with such alteration. *Luellen* v. *Hare*, 32 Ind. 211. And the fact that a blank space has been left in a note, sufficient for the insertion of additional words therein without creating suspicion, will not alone, and as matter of law, authorize the holder to insert additional words, after the execution and delivery of the note, without the consent of the maker. *Bruce* v. *Westcott*, 3 Barb. 374. Where a party to a negotiable instrument intrusts it to another for use as such, with blanks not filled, it carries on its face an implied authority to complete it by filling them, but not to vary or alter its material terms by erasing what is written or printed as a part thereof, nor to pervert its scope or meaning by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument.

*Angle* v. *North-Western Mut. Life Ins. Co.*, 2 Otto, 330. It is for the jury to determine whether the instrument was delivered as an incomplete paper, with blanks to be filled. *Abbott* v. *Rose*, 62 Me. 194; S. C., 16 Am. Rep. 427.

So, an instrument required by law to be under seal, if executed in blank as to the name of the grantee, mortgagee, obligee, covenantee, etc., as the case may be, is void; and the mere delivery of such an instrument does not authorize the party to whom it may be delivered, to fill up the blank, although the delivery may have been made for a valuable consideration. *Smith* v. *Fellows*, 9 Jones & Sp. (N. Y.) 36. And see *Chauncey* v. *Arnold*, 24 N. Y. (10 Smith) 330.

§ 6. **Of the intent.** It is held that an *immaterial* alteration of a written instrument does not vitiate it, although made with a fraudulent intent (*Moye* v. *Herndon*, 30 Miss. 110; *Robinson* v. *Phœnix Ins. Co.*, 25 Iowa, 430; *Booth* v. *Powers*, 56 N. Y. [11 Sick.] 22; *Miller* v. *Reed*, 27 Penn. St. 246); while a *material* alteration will invalidate the instrument, though made without a fraudulent motive. *Murray* v. *Grayham*, 29 Iowa, 520; *Fay* v. *Smith*, 1 Allen, 477. The material test as to liability on an altered instrument is whether its identity remains. If the alteration of a note, etc., be made fraudulently, or with an illegal intent, or the original words cannot be certainly restored, or any party has become interested in it, or affected by it, or related to it, since the alteration, so that the alteration will do him wrong, the party making the alteration must abide by it and its consequences. *Kountz* v. *Kennedy*, 63 Penn. St. 187; S. C., 3 Am. Rep. 541. Otherwise he may restore the note, etc., to its original form and force. Id.

§ 7. **By a stranger.** It was formerly held that a material alteration made even by a stranger rendered the instrument void, notwithstanding the original words might be restored. *Pigott's Case*, 11 Co. Rep. 27. And see *Master* v. *Miller*, 4 Term R. 320; S. C., 2 H. Bl. 141. But the modern and more sensible rule is, that an alteration made by a stranger to the instrument, without procurement or connivance of either party, does not affect the rights of either, if the original tenor of the instrument can be ascertained. *Hunt* v. *Gray*, 35 N. J. Law, 227; S. C., 10 Am. Rep. 232; *Bigelow* v. *Stephens*, 35 Vt. 521; *Nichols* v. *Johnson*, 10 Conn. 193; *Boyd* v. *McConnell*, 10 Humph. (Tenn.) 68; *Croft* v. *White*, 36 Miss. 455; *Lubbering* v. *Kohlbrecher*, 22 Mo. 596; *Marcy* v. *Dunlop*, 5 Lans. (N. Y.) 365; *Henfree* v. *Bromley*, 6 East, 309. See *Bridges* v. *Winters*, 42 Miss. 135; S. C., 2 Am. Rep. 598. And an alteration made by the agent of the maker, under the supposition that he has authority to make such alteration, will not render the instrument void, in the absence of any proof of a fraudulent intent.

*Collins* v. *Makepeace*, 13 Ind. 448; *Van Brunt* v. *Eoff*, 35 Barb. 501; *Miller* v. *Reed*, 3 Grant's (Penn.) Cas. 51. So, it is held that if an agent of a payee, intrusted with the note for the purpose of having it discounted in bank, alter it, such alteration will be considered the act of a stranger, and will not avoid the note. *Hunt* v. *Gray*, 35 N. J. Law, 227; S. C., 10 Am. Rep. 232. So, one who is simply an agent to sell goods, and receive and transmit the price to his principal, is not the agent of his principal to alter a note so received, and an alteration by him is simply deemed a *spoliation*. *Bigelow* v. *Stiphens*, 35 Vt. 521. But an alteration made by the payee's wife, without his consent, was held fatal in *Morrison* v. *Welty*, 18 Md. 169.

§ 8. **By mistake.** An alteration made by mistake does not in general affect the liability of the parties to the instrument. *Novelli* v. *Rossi*, 2 B. & Ad. 757, 765; *Warwick* v. *Rogers*, 5 M. & G. 352; S. C., 6 Scott N. R. 1; *Cochran* v. *Nebeker*, 48 Ind. 459. And see the cases cited in the preceding section. Thus, it is said, "if the absence of *intention* to cancel be clearly shown, the thing is not canceled." MAULE, J., in *Bamberger* v. *Commercial Credit Mut. Ass. So.*, 15 C. B. 676, 693.

§ 9. **Ratification.** A party to an instrument may ratify or consent to an alteration after it has been made (*Tarleton* v. *Shingler*, 7 C. B. 812; *Grimstead* v. *Briggs*, 4 Iowa, 559; *King* v. *Hunt*, 13 Mo. 97); and without a new consideration. *Pelton* v. *Prescott*, 13 Iowa, 567. And a subsequent ratification of the alteration will be equivalent to an original authority to make it. *Humphrey* v. *Guillow*, 13 N. H. 385.

§ 10. **What are material alterations.** When any alteration is made which causes the instrument to speak a language different in legal effect from that which it originally spoke, it is a material alteration. *Bridges* v. *Winters*, 42 Miss. 135; S. C., 2 Am. Rep. 598. See *ante*, p. 469, § 1. And it may be stated as a general principle, that, in order to avoid an instrument, the alteration must be material. See *ante*, p. 472, § 6. Whether an alteration is material is a question of law, and it is held to be error for the court to leave it to be determined by the jury, *Stephens* v. *Graham*, 7 Serg. & R. 508; *Robinson* v. *Phœnix Ins. Co.*, 25 Iowa, 430; *Steele* v. *Spencer*, 1 Pet. (U. S.) 552; *Bowers* v. *Jewell*, 2 N. H. 543.

Instances of material alterations will be found in subsequent articles.

§ 11. **What are immaterial alterations.** Where the law would supply the matter added, or it is in an immaterial portion of the instrument, the alteration is said to be immaterial. *Burnham* v. *Ayer*. 35 N. H. 351; *Brown* v. *Pinkham*, 18 Pick. 172. And it was formerly the English rule that an alteration, although immaterial, would

avoid the instrument. See *Pigott's Case*, 11 Co. Rep. 27. But in a recent English case, the court examined the authorities at length, and said, "we think we are not bound by the doctrine in *Pigott's Case*, or the authority cited for it; and not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice any one destroys the validity of the note. It seems to us repugnant to justice and common sense, to hold that the maker of a promissory note is discharged from his obligation to pay it, because the holder has put in writing, on the note, what the law would have supposed, if the words had not been written." *Aldous* v. *Cornwell*, L. R., 3 Q. B. 573. The rule established by the weight of the later decisions, therefore, is, that an immaterial alteration, which does not vary the meaning of an instrument, does not avoid it, although made by the party claiming under it. *Burnham* v. *Ayer*, 35 N. H. 351; *Cole* v. *Hills*, 44 id. 227. And see *ante*, pp. 469, 479, §§ 2, 6 and 7. It has been held that, where gold is the legal tender, the addition of the words "in gold," so as to make the note payable in gold, is not a material alteration, if done without a fraudulent intent, as it does not affect the legal liability of the parties. *Bridges* v. *Winters*, 42 Miss. 135; S. C., 2 Am. Rep. 598. But see *Langenberger* v. *Kroeger*, 48 Cal. 147; S. C., 17 Am. Rep. 418. So, an alteration is in general harmless, where it was made to correct a mistake, and to conform the instrument to what all the parties to it agreed, or intended it should be. *Hervey* v. *Harvey*, 15 Me. 357; *Ames* v. *Colburn*, 11 Gray, 390; *Derby* v. *Thrall*, 44 Vt. 413; S. C., 8 Am. Rep. 389; *Duker* v. *Franz*, 7 Bush (Ky.), 273; S. C., 3 Am. Rep 314. And see *ante*, p. 478, § 4.

§ 12. **Presumptions.** The authorities are divided upon the question whether, when a material alteration appears upon the face of the instrument, it is to be *presumed*, in the absence of explanation, to have been made *before* or *after* the execution and delivery. Some of the cases hold it to be a presumption of fact that an apparent alteration was made *after* the execution of the instrument, and that the question is for the jury to determine. *Croft* v. *White*, 36 Miss. 455; *Paine* v. *Edsell*, 19 Penn. St. 180; *Crabtree* v. *Clark*, 20 Me. 337; *White* v. *Hass*, 32 Ala. 432; *Provost* v. *Gratz*, 1 Pet. (C. C.) 365. The rule most in accordance with the judicial decisions of the State of New York is stated to be that the instrument, with all the circumstances of its history, its nature, the appearance of the alteration, the possible or probable motives to the alteration or against it, and its effect upon the parties respectively, ought to be submitted to the jury, for them to determine when it was made, and whether fraudulently or not; and that the court cannot presume from the mere fact that

an alteration appears on the face of the instrument, whether under seal or otherwise, that it was made after the signing. *Maybee* v. *Sniffin*, 2 E. D. Smith (N. Y.), 1; S. C. affirmed, 16 N. Y. (2 Smith) 560. The doctrine is stated in nearly the same language by the courts in New Hampshire, and it is added that in the great majority of cases the jury would be able to settle the questions readily upon a preponderance of the evidence, where they should consider the paper in connection with all the circumstances above stated. But if they should not be able to do so, and could not find any preponderance of the evidence as to when the alteration was made, or if there is an entire absence of evidence and of circumstances, both in the instrument and in the evidence *aliunde*, from which an inference can be legitimately drawn as to the time when it was actually made, then the presumption arises that the alteration was made after the execution of the instrument; and this is a presumption of fact which the jury are to make, under proper instructions from the court, where they shall be unable to find the fact from any evidence or circumstances in the case. *Cole* v. *Hills*, 44 N. H. 227.

In many of the States it is held that the presumption will be, in the absence of all proof or circumstances tending to show how the facts were, that the alteration was made before the execution of the instrument. See *Gooch* v. *Bryant*, 13 Me. 390; *North River Meadow Co.* v. *Shrewsbury Church*, 2 Zabr. (N. J.) 424; *Sirrine* v. *Briggs*, 31 Mich. 443; *McCormick* v. *Fitzmorris*, 39 Mo. 34; *Bailey* v. *Taylor*, 11 Conn. 531; *Simpson* v. *Stockhouse*, 9 Penn. St. 186. In Vermont it is held in the like case that the presumption should be that the alteration was made at the time of the execution, and it is said that this is according to the rule of the common law. *Beaman* v. *Russell*, 20 Vt. 205. See, also, *Farnsworth* v. *Sharp*, 4 Sneed (Tenn.), 55; *Mathews* v. *Coalter*, 9 Mo. 705; *Stoner* v. *Ellis*, 6 Ind. 152.

In South Carolina it is held that, whether an alteration was made before or after an instrument was executed, is generally a question of fact upon all the circumstances. The party offering the instrument is not bound to offer evidence to show when the alteration was made, but may rely upon appearances on the face of the instrument itself to explain it. *Wicker* v. *Pope*, 12 Rich. (S. C.) 387.

In Ohio the doctrine is, that, where an alteration is suspicious, and beneficial to the holder of the instrument, the party seeking to enforce it is required to explain it before he can recover; but where such is not the nature of the alteration, it will be presumed to have been made either before the execution of the paper, or by the consent of the parties. *Huntington* v. *Finch*, 3 Ohio St. 445.

So, in a recent case in New York, it is said to be a salutary rule which the courts are generally disposed to adopt, that where an alteration in an instrument appears suspicious on its face, and is not duly noted on the paper, the burden of proof is upon the party who claims that the alteration was genuine. *O'Donnell* v. *Harmon*, 3 Daly (N. Y.), 424. See, also, *Pringle* v. *Chambers*, 1 Abb. (N. Y.) Pr. 58; *Burton* v. *Pressly*, 1 Cheves (S. C.), part 2, 1.

Where the alteration was not in the handwriting of the party, nor of the only person likely to have access to the instrument, and there was no evidence that it was made at the instance of the party offering it, except the fact that the paper was in her custody, the court presumed the alteration to have been made by a stranger. *Craft* v. *White*, 36 Miss. 455.

## ARTICLE II.

### ALTERATION OF BONDS.

**Section 1. In general.** A material alteration or interlineation in a bond made after execution, as a general rule, avoids it. *Miller* v. *Stewart*, 4 Wash. (C. C.) 26; *Rucker* v. *Howard*, 2 Bibb (Ky.), 168; *Smith* v. *United States*, 2 Wall. 219. The general principle running through all the cases in relation to alterations and interlineations of a material character, in all instruments under seal is, that, as to such of the parties thereto who have not, prior to or at the time, assented to the alteration or interlineation, the instrument is absolutely void (Id.; *Warring* v. *Williams*, 8 Pick. 322; *Cleaton* v. *Chambliss*, 6 Rand. [Va.] 86); and, as it respects a bond, it has been held, that where a material alteration has been made therein, it cannot be rendered valid by the subsequent assent of the obligor without a new signing, sealing and delivery. *Sans* v. *People*, 8 Ill. 327. See *ante*, p. 478, Art. 1, § 4. Some of the cases, however, hold that when the alteration is made by consent of the parties, whether given before or *after* execution, the instrument is binding, and that such consent may be proved by parol. See id.; *Speake* v. *United States*, 9 Cranch, 28; *Kerwin's Case*, 8 Cow. 118. Where the defendant had executed a bond entirely in blank, and it was filled up and afterward shown to him, and he admitted his signature and did not deny that he would be bound by it, it was held that it was a valid bond. *Byers* v. *McClanahan*, 6 Gill & J. (Md.) 250. So, it is said in *Hill* v. *Scales*, 7 Yerg. (Tenn.) 410, that if the name of an obligor be signed without his authority, yet, if he afterward acknowledge the bond to be his, he will be bound.

A bond is not avoided by the tearing off of the seal by the obligor,

whether done fraudulently or innocently, if without the assent of the obligee. *Cutts* v. *United States*, 1 Gall. (C. C.) 69; *United States* v. *Spaulding*, 2 Mas. (C. C.) 478. But, it is held that a bond to which a writing was attached which has been torn off, cannot be received in evidence after such mutilation. *Price* v. *Tallman*, 1 N. J. Law, 447.

§ 2. **Materiality of the alteration.** Immaterial alterations of a bond will not invalidate the instrument (*Reed* v. *Kemp*, 16 Ill. 445. See *ante*, p. 472, Art. 1, § 6); nor even if material, when made by a stranger, and without the participation of any party interested. *Terry* v. *Hazlewood*, 1 Duv. (Ky.) 104. See *ante*, p. 472, Art. 1, § 7. An alteration in a bond by a clerk in the custom house after its execution for the purpose of correcting it, but not affecting its construction, was held to be the act of a stranger and immaterial, and that it did not avoid the bond. *United States* v. *Hatch*, Paine (C. C.), 336. So, an alteration by a judge, of a bond, taken by him after it is beyond his power to withdraw or vacate it, does not affect its validity, although in a material part. *Harris* v. *Bradford*, 4 Ala. 214.

The cutting off of a receipt written on the margin of the bond by the obligee is not a mutilation of the bond. *Goodfellow* v. *Inslee*, 12 N. J. Eq. 355. And the obliteration by the holder of a bond of a payment indorsed on it does not destroy the validity of the bond. Such an entry is no more than a receipt, and constitutes no part of the bond. *Simms* v. *Paschall*, 5 Ired. (N. C.) L. 276. See, also, *Bryan* v. *Dyer*, 28 Ill. 188.

§ 3. **Altering as to the parties.** The insertion of the name of an obligor in the body of a bond after he has executed it is not a material alteration, and does not avoid the instrument since he would be held if it had not been inserted. *Stone* v. *Wilson*, 4 McCord (S. C.), 203; *Wilder* v. *Butterfield*, 50 How. (N. Y.) 385. And see *Richardson* v. *Rogers*, id. 403; *Cotten* v. *Williams*, 1 Fla. 37. But the erasure of the names of a part of the obligors in a bond without the assent of the others is a material alteration and avoids the bond as to all (*Briggs* v. *Glenn*, 7 Mo. 572); and in an action on a bond against several obligors where it appears that the name of one of the obligors was erased from the bond, and the suit is brought against all except him, it lies upon the obligee to show that the erasure was made with the consent of the other parties. *Barrington* v. *Bank of Washington*, 14 Serg. & R. 405. So, after a bond with sureties has been executed and delivered, the erasure of the name of one of the sureties, and the substitution of another, if done while the bond is in the control of the obligee, and without the knowledge or consent of the other sureties, will avoid the bond. *State* v. *Polke*, 7 Blackf. (Ind.) 27. See, also, *State* v. *Van Pelt*,

1 Smith (Ind.), 118; S. C., 1 Ind. 304; *Smith* v. *United States*, 2 Wall. 219. It has likewise been held that, if after the execution of a bond by several persons, it is altered by inserting in the body of it the names of others as co-obligors, and adding their signatures and the circumstances under which the alteration was made, are not explained by the obligee, the bond will be considered void as to the first obligors, and a suit against all the obligors cannot be sustained. *Harper* v. *State*, 7 Blackf. (Ind.) 61. And see *Oneal* v. *Long*, 4 Cranch, 60.

The erasure of the name of one obligee, and the substitution of another, avoids the instrument as to parties not consenting. *Smith* v. *Weld*, 2 Penn. St. 54. Thus, if a replevin bond, made to one obligee, is altered after its execution, and made payable to another, without authority from the parties, the alteration is a material one, and avoids the bond; and the burden is upon the person making the alteration to show that he had authority. *Dolbier* v. *Norton*, 17 Me. 307. So, a bond was signed by A and B, and left in B's hands to raise money thereon, with the understanding that the money should be obtained of C, though B was not forbidden to get it of any one else, and a blank was left for the obligee. B got the money of D, and inserted his name in the blank, and it was held that A was not liable to D on the bond (*Preston* v. *Hull*, 23 Gratt. [Va.] 600; S. C., 14 Am. Rep. 153); for the reason, that the instrument when he signed it was not a bond. Id. And it was asserted that to fill the blank in such case would be in effect to write a new contract over the signature of the surety. Id. But where the principal in a bail bond, after the surety had signed it, but before delivery, erased the name of the sheriff as obligee, and inserted that of the constable who served the writ, at his suggestion and in his presence, it was held that the alteration did not avoid the obligation of the surety, his consent being presumed. *Hale* v. *Russ*, 1 Me. 334.

So, where the obligee in a bond attempted to retrace part of the obligor's name, which had been blotted with ink and obscured, and, in doing so, mis-spelled it, but not so as to alter the sound, and no fraud being imputable to the act, it was held that the obligation was not thereby avoided. *Dunn* v. *Clements*, 7 Jones' (N. C.) L. 58. And see *State* v. *Dean*, 40 Mo. 464; *Turner* v. *Billagram*, 2 Cal. 520.

An alteration in a material part of a bond, given by a trustee, to show the interest of a *cestui que trust*, made without the knowledge of a trustee, by a party beneficially interested therein, will destroy the bond, but will not operate to destroy an estate which existed before and independently of the bond. *Williams* v. *Van Tuyl*, 2 Ohio St. 336.

§ 4. **Altering the date.** It is held that a bond is valid, though there is no date, or an erroneous one. *Fournier* v. *Cyr*, 64 Me. 32; *ante*,

Vol. 1, p. 673. And the alteration of the date in a bond, after its execution, from the "——— day of December, 1823," to the "3d day of May, 1824," was held to be an immaterial alteration, and such as did not affect the validity of the bond, especially as it did not appear to have been made by the obligee. *State* v *Miller*, 3 Gill (Md.), 335.

§ 5. **Altering as to witnesses.** Where a person puts his name to a bond as a subscribing witness, without the knowledge or consent of the obligor, it is not such an addition to, or alteration of the bond, as to vitiate and render it void. *Blackwell* v. *Lane*, 4 Dev. & Bat. (N. C.) L. 113. But if, after the execution and delivery of an unattested bond, the obligee fraudulently, and with a view to some improper advantage, and without the knowledge and assent of the obligor, procures a person who was not present to put his name thereto as a subscribing witness, the obligor is thereby discharged. *Adams* v. *Frye*, 3 Metc. (Mass.) 103; *Homer* v. *Wallis*, 11 Mass. 309.

§ 6. **Altering the amount.** It has been held that the penalty of an official bond cannot be inserted by a third person after the execution by the obligor, in his absence, without an express authority, under his hand and seal. *State* v. *Boring*, 15 Ohio, 507; *Famulener* v. *Anderson*, 15 Ohio St. 473. So, where an administrator's bond failed to express any sum for which the obligors were bound, and no blank being left in such bond, it was held not to be a binding instrument, and that the sureties therein were not liable. *Evarts* v. *Steger*, 6 Oreg. 55. On the other hand, in an action upon an undertaking where the obligors bound themselves in the sum of "five hundred," but omitted to use the word "dollars," it was held that the undertaking must be construed in connection with the statute which authorized it, and that the omitted word might be supplied, and the instrument read as though it had been expressed. *Whitney* v. *Darrow*, 5 id. 442.

Where a bond was declared on as a bond of a certain sum, and the evidence was that it had been altered to that sum, from a smaller one, it was held that the plaintiff had no right to recover the latter sum, because his evidence did not, upon *non est factum*, support the issue made by his replication. *Mathis* v. *Mathis*, 3 Dev. & B. (N. C.) 60. See *Gardinier* v. *Sisk*, 3 Penn. St. 326; *People* v. *Brown*, 2 Dougl. (Mich.) 9.

An alteration of a bond after its execution, by adding the words "in specie," after the sum payable in the bond, without the knowledge or consent of a surety, is held to be material, and will avoid the bond as to him. *Darwin* v. *Rippey*, 63 N. C. 318.

§ 7. **Changing rate of interest.** An alteration in a bond of the rate of interest from four and one-half to four and three-fourths per cent,

after the bond was overdue, is held to be immaterial, and will not prejudice the plaintiff's right of recovery thereon. *Burkholder* v. *Lapp*, 31 Penn. St. 322.

A writing obligatory was executed by three obligors, by which they bound themselves to pay to the obligee a sum of money, nine months after date. One of the obligors was, in fact, a principal, and the others sureties. After the obligation was executed, the principal, on the same day, without the knowledge of the sureties, made a memorandum at the foot thereof, under his hand and seal, stating that the obligation was to bear interest from its date, and it was held that this memorandum did not discharge either the principal or the sureties from their obligation. *Tremper* v. *Wemphill*, 8 Leigh (Va.), 623. Changing the rate of interest in a note from six to seven per cent is a material alteration. *Harsh* v. *Klepper*, 28 Ohio St. 200.

§ 8. **Changing the numbers** The alteration of the numbers of a negotiable bond payable to bearer, although made with fraudulent intent, will not invalidate the title of a subsequent innocent holder. *Commonwealth* v. *Emigrant, etc., Bank*, 98 Mass. 12.

## ARTICLE III.

### ALTERATION OF DEEDS.

**Section 1. In general.** As it regards the effect of an alteration in a deed, the general rule now received is, that an alteration after execution, made by one claiming a benefit under the deed, or by his privity, destroys the instrument as to him, and he can never sue upon it. *Lewis* v. *Payn*, 8 Cow. 71; *Withers* v. *Atkinson*, 1 Watts, 237; *Bliss* v. *McIntyre*, 18 Vt. 466; 1 Smith's Lead. Cas. (7th Am. ed.) 1280. It is even held that when a deed has been acknowledged before a magistrate, appointed by law to take and certify the acknowledgment, in order that the deed may be recorded, the parties have no right to make the most *trifling* alteration. *Coit* v. *Starkweather*, 8 Conn. 289; *Moore* v. *Bickham*, 4 Binn. (Penn.) 1. And authority to alter a deed is not to be implied. *Wallace* v. *Harmstad*, 15 Penn. St. 462. But erasures made during the execution of a deed, and noted in the attestation, will not vitiate it. *Britton* v. *Stanley*, 4 Whart. (Penn.) 114. And see *Collins* v. *Collins*, 51 Miss. 311; S. C., 24 Am. Rep. 632. And an alteration in a deed before it reaches the hands of the grantee does not avoid it against him, when he is innocent in the matter. *Pope* v. *Chafee*, 14 Rich. (S. C.) Eq. 69. So, a deed by husband and wife, altered after execution by the husband's consent, is still good against him, though void as against the wife. *Prettyman* v. *Goodrich*, 23 Ill.

330. And in general, where an alteration is made in a deed by a party entitled under it, it is avoided only as to him, and the instrument continues unchanged in law, as to other innocent parties to it. Thus, where a conveyance of land, reserving a rent in fee, is altered by the insertion of material words, after delivery, by the grantor or his agent, the land passes discharged of the covenant; and the covenant being avoided by such alteration as relates to the covenantee, and his right of action extinguished, a purchaser, although in good faith, and without notice, is in no better situation than he was. *Arrison* v. *Harmstead*, 2 Penn. St. 191. And see *Wallace* v. *Harmstad*, 44 id. 492; *Woods* v. *Hilderbrand*, 46 Mo. 284; S. C., 2 Am. Rep. 513; *Herrick* v. *Malin*, 22 Wend. 388. An alteration in a deed of land, though made subsequently to its execution, and feloniously, does not avoid *the title*. *Jackson* v. *Jacoby*, 9 Cow. 125.

Where a deed was executed with a blank left therein for the name of the grantee, and in that condition placed in the hands of an agent, with verbal authority to fill the blank, and the agent did fill the blank with the name of a grantee in the absence of the grantor and delivered the deed, it was held that the deed was valid. *Field* v. *Stagg*, 52 Mo. 534; S. C., 14 Am. Rep. 435. But see *contra*, *Upton* v. *Archer*, 41 Cal. 85; S. C., 10 Am. Rep. 266. See *ante*, p. 471, Art. 1, § 5.

§ 2. **Presumptions as to alteration.** See, generally, as to presumptions, *ante*, p. 474, Art. 1, § 12. According to some of the decisions, the presumption is, that any material alteration in a deed, which is not noted in the attestation clause, has been made since execution; and the party claiming under the deed must show the contrary, or otherwise explain the alteration. *Montag* v. *Linn*, 23 Ill. 551; *Acker* v. *Ledyard*, 8 Barb. 514; *Dow* v. *Jewell*, 18 N. H. 340. And see *Van Horn* v. *Bell*, 11 Iowa, 465. But see *Pullen* v. *Shaw*, 3 Dev. (N. C.) L. 238; *Ely* v. *Ely*, 6 Gray, 439.

Where an interlined or altered deed is offered in evidence, the burden of proof is held to lie upon the party seeking to be benefited by such interlineations or alterations, to show that they were made before execution; and all the circumstances are to go to the jury. *Jordan* v. *Stewart*, 23 Penn. St. 244. And see *Roberts* v. *Unger*, 30 Cal. 676.

The fact that a deed is written in two different kinds of ink, or that the grantee's name is written over an erasure of another name, is not sufficient to exclude the deed as evidence, nor does it raise a presumption of an alteration, but the question may be left to the jury, and these circumstances may be explained by the party offering the deed, either before or after it is read. *Smith* v. *McGowan*, 3 Barb. 404; S. C., 1 Code R. 1. See *Howard* v. *Colquhoun*, 28 Tex. 134.

§ 3. **Of immaterial alterations.** Alterations in deeds are immaterial, where neither the rights, interests, duties or the obligations, of either of the parties, are in any manner affected or changed. See *Smith* v. *Crooker*, 5 Mass. 538; 1 Sm. Lead Cas. (7th Am. ed.) 1286. Thus where words interlined in a deed do not change its sense or meaning, the interlineation is immaterial, and does not affect the validity of the deed. *Gordon* v. *Sizer*, 39 Miss. 805. And the general rule as now settled may be taken to be, that an immaterial alteration of a deed will not vitiate the instrument, unless it is fraudulent. See *Dunn* v. *Clements*, 7 Jones' (N. C.) L. 58; *Adams* v. *Frye*, 3 Metc. (Mass.) 103; *Langdon* v. *Paul*, 20 Vt. 217; *Hale* v. *Russ*, 1 Me. 334. But in some of the cases it is said that the immaterial alteration by a party claiming under the deed will avoid it as to him. *Malin* v. *Malin*, 1 Wend. 625; *Smith* v. *Weld*, 2 Penn. St. 54; *Van Brunt* v. *Van-Brunt*, 3 Edw. Ch. 14. See *Collins* v. *Collins*, 51 Miss. 311; S. C., 24 Am. Rep. 632.

In *Waring* v. *Smith*, 2 Barb. Ch. 119, it is held that an alteration of a deed by a stranger, without the privity or consent of the grantee, will not render a deed void, where the original contents of the deed can be ascertained; but the burden of proof is on such grantee, to show that the alteration was not made by him, or with his privity or consent. See, also, *Lee* v. *Alexander*, 9 B. Monr. (Ky.) 25. A deed is not avoided by having the seal torn therefrom by a stranger. *Rees* v. *Overbaugh*, 6 Cow. 746. And where the names of two of the grantors, who had executed a deed, were inserted in the body of the deed after execution, it was held that this alteration could not affect the validity of the deed to pass the title of other grantors. *Bird* v. *Bird*, 40 Me. 398.

## ARTICLE IV.

### ALTERATION OF MORTGAGES.

**Section 1. Mortgages of real estate.** It is held that a material alteration made in a mortgage, without the consent of the mortgagor, either by the mortgagee, or a third person, at his instance, will avoid the mortgage, so far that no action can be maintained upon it to enforce the debt. *Waring* v. *Smyth*, 2 Barb. Ch. 119; *Marcy* v. *Dunlap*, 5 Lans. (N. Y.) 365. It is even held that a mortgage, executed in blank, that is, without inserting the name of any mortgagee, may not be filed in, without the express authority of the grantor, evidenced otherwise than by mere delivery. An instrument in the form of a mortgage, but containing the name of no mort-

gagee, does not become effectual by delivery to one who advances money upon the faith of an agreement that he shall hold the instrument as security for such advance. *Chauncey* v. *Arnold*, 24 N. Y. (10 Smith) 330. See, also, *Smith* v. *Fellows*, 9 Jones & Sp. (N. Y.) 36; *Preston* v. *Hull*, 23 Gratt. (Va.) 600; S. C., 14 Am. Rep. 153. Mortgages have, however, been held valid, although the mortgagee's name had been inserted after execution, by an agent without authority under seal. *Van Etta* v. *Evenson*, 28 Wis. 33; S. C., 9 Am. Rep. 486.

Where one of two mortgagors after signature of his co-mortgagor, and unknown to him, added in the description, further property of the two mortgagors, it was held, that the mortgage was valid against both mortgagors, as to the property described before the alteration, and against the altering mortgagor, also, for the further property described by him in his addition. *Van Horn* v. *Bell*, 11 Iowa, 465.

So, it is held that a mortgage of land is not rendered invalid by the fraudulent addition, by the grantee, of the name of the grantor's wife, as a party signing the same for the purpose of releasing dower. *Kendall* v. *Kendall*, 12 Allen, 92.

§ 3. **Chattel mortgages.** See Vol. 2, pp. 174 *et seq.*

## ARTICLE V.

### ALTERATION OF CONTRACTS.

**Section 1. In general.** Any ordinary contract may be altered by consent of parties. See *ante*, p. 470, Art. 1, § 4. If, therefore, both the parties to a contract agree to an alteration of it, they are still bound by it, but the surety of either will be discharged. If the surety, however, consents to the alteration, or if he subsequently, with a full knowledge of the facts, approves of it, he remains bound for the performance of the agreement. *Gardiner* v. *Harback*, 21 Ill. 129.

The addition of a word which the law would supply if it were not added to the writing, is not such an alteration as avoids a contract (*Hunt* v. *Adams*, 6 Mass. 519); and an alteration by a stranger, though *material*, will not render the instrument inoperative. *Nichols* v. *Johnson*, 10 Conn. 192. See *ante*, p. 472, Art. 1, § 7. So it has been held that the addition of a clause in writing, to a printed agreement, is not presumed to have been made after the execution of the instrument, so as to throw the burden of explaining it on the holder of the paper. *Ellison* v. *Mobile, etc., R. R. Co.*, 36 Miss. 572. See *ante*, p. 474, Art. 1, § 12.

And where an agreement signed by three was altered, by consent of

two of them, by adding seals to the three names, and interlining the words "jointly and severally," and then was delivered by those two, it was held that they were bound by the instrument in its altered form. *Warring* v. *Williams*, 8 Pick. 322.

But where it was alleged that after the execution of an agreement to sell certain goods and account for the proceeds thereof, the holder changed the date from the 10th to the 16th of May, it was held that the date was an essential part of the agreement, and if changed, avoided it. *Getty* v. *Shearer*, 20 Penn. St. 12.

§ 2. **Of assignments.** We have seen, *ante*, p. 476, Art. 2, that an instrument which has been fraudulently altered in a material part is thereby rendered void, and will not support an action. This rule applies to assignments, and it is held that an addition of the name of the assignee to an assignment, after its execution, is a material alteration, which will call for explanation from the party offering the instrument. *Park* v. *Glover*, 23 Tex. 469.

The question of a material alteration in a written assignment of a contract, more nearly concerns the actual parties to the assignment, than the parties to the contract. Hence it is held that a material alteration in the assignment, which, unless explained, might affect it as between the parties thereto, will not necessarily affect it as between the assignee and the contractor. *Minert* v. *Emerick*, 6 Wis. 355.

§ 3. **Bills of lading.** See Vol. 1, p. 531. When an action brought against the owner of a vessel, for not delivering goods pursuant to the bill of lading, is founded on the breach of duty as a carrier, the fact that the plaintiff has made an alteration in the bill of lading is immaterial, since it cannot affect the question of the wrongful breach of duty. *Benbury* v. *Hathaway*, 6 Ired. (N. C.) L. 303.

§ 4. **Of bills of sale.** Where a buyer, in a bill of sale, willfully alters it for the purpose of covering property from execution, such altered instrument is not evidence to go to the jury, in an action by such buyer against the sheriff for taking the goods. *Babb* v. *Clemson*, 10 Serg. & R. 419.

§ 5. **Of guaranty.** In an action on a written guaranty which, on its face, appeared to have been altered by an interlineation, it was held that the burden of proof was on the plaintiff to show that the interlineation was made before the instrument was executed. *Wilde* v. *Armsby*, 6 Cush. 314. See *ante*, p. 474, Art. 1, § 12.

§ 6. **Of insurance policy.** A policy of insurance and indorsements thereon, constituting a contract of insurance with the assured, will not be avoided by even a *material* alteration of a contract between the com-

pany and another party, indorsed on the same policy. *Robinson* v. *Phœnix Ins. Co.*, 25 Iowa, 430.

§ 7. **Of receipts.** An officer having attached goods, delivered them to A, who gave his receipt for them; soon afterward, B signed the same receipt, the goods having been, in the meantime, attached and taken away by C. A brought an action against C for taking the goods, and, wishing to offer B as a witness, procured his name to be cut from the receipt, with the consent of B and the officer; and it was held that the receipt was not thereby destroyed. *Burrows* v. *Stoddard*, 3 Conn. 160.

## ARTICLE VI.

### ALTERING NEGOTIABLE INSTRUMENTS.

**Section 1. In general.** It is said in *Wood* v. *Steele*, 6 Wall. 80, that the doctrine as now settled in both English and American jurisprudence is, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability. The English courts have gone so far as to hold that a material alteration, even by a stranger, as completely avoids the written instrument as if made by a party claiming under it. *Davidson* v. *Cooper*, 11 M. & W. 778; S. C. affirmed, 13 id. 343; *Bank of Hindustan* v. *Smith*, 36 L. J. (C. P.) 241. But, as we have seen, *ante*, p. 472, Art. 1, § 7, in this country, an alteration by a stranger, though material, will not render the instrument inoperative. See, also, *Bigelow* v. *Stilphens*, 35 Vt. 521; *Nichols* v. *Johnson*, 10 Conn. 192. It is, however, held that the holder of a bill has no right to make an alteration in it, even to correct a mistake, unless to make the instrument conform to what all parties to it agreed, or intended it should be. *Hervey* v. *Harvey*, 15 Me. 357; *McRaven* v. *Crisler*, 53 Miss. 542. See *Ames* v. *Colburn*, 11 Gray, 390.

When a negotiable instrument has become void by alteration, the instrument itself cannot be the foundation of a recovery in any form of action. *Martendale* v. *Follet*, 1 N. H. 95. But if an alteration is made without fraudulent intention, the payee may resort to the original indebtedness, if that was independent of the note, and has not been discharged by the execution of it. *Merrick* v. *Boury*, 4 Ohio St. 60; *Lewis* v. *Schenck*, 18 N. J. Eq. 459; *Booth* v. *Powers*, 56 N. Y. (11 Sick.) 22. But to have such resort, the plaintiff must produce and surrender the note. Id. And when an instrument is fraudulently altered by one claiming under it, there can be no recovery upon the original consideration. *Kennedy* v. *Crandell*, 3 Lans. (N. Y.) 1; *Meyer* v. *Huneke*, 55 N. Y. (10 Sick.) 412; *Smith* v. *Mace*, 44 N. H. 553.

If the maker of a bill, note or check issues it in such a condition that it may easily be altered without detection, he is liable to a *bona fide* holder who takes it in the usual course of business before maturity. *Brown* v. *Reid*, 79 Penn. St. 370; 21 Am. Rep. 75.

§ 2. **As to sureties.** It is a doctrine now well supported by authority, that a promisor, who has signed a note as surety merely, will be discharged by an unauthorized material alteration of the note after the surety signed it, and before delivery to the payee. *Crocket* v. *Thomason*, 5 Sneed (Tenn.), 342; *Ivory* v. *Michael*, 33 Mo. 398; *McCramer* v. *Thompson*, 21 Iowa, 244; *Draper* v. *Wood*, 112 Mass. 315; S. C., 17 Am. Rep. 92, 97, note. Intrusting a note made by several joint makers to one of their number for delivery to the payee, does not imply an authority to him to add to it any thing to increase the liability of the others. *Schnewind* v. *Hacket*, 54 Ind. 248. And where, without the consent of the original parties to the note, the name of another maker is added, the alteration will discharge the original maker, and the party who subsequently signs his name will be liable as upon a new note executed by him alone. *Dickerman* v. *Miner*, 43 Iowa, 508. See, also, *Goodspeed* v. *Cutler*, 75 Ill. 534.

Where two sureties sign a note, and afterward the name of one is cut off without the consent of the other, and another surety substituted, this is a material alteration, and discharges the liability of the surety not consenting to the change. *Davis* v. *Coleman*, 7 Ired. 424.

But a note signed in blank by a surety, subsequent to which, and without his knowledge, seals were affixed to it, may be enforced in the hands of an innocent holder, in the manner and to the extent contemplated by the surety. *Fullerton* v. *Sturges*, 4 Ohio St. 529. And if one is induced to sign a note as surety, supposing a forged name thereto to be genuine, he is still bound, if the obligee was ignorant of the circumstances. *Chase* v. *Hathorn*, 61 Me. 505; *Trevathan* v. *Caldwell*, 4 Heisk. (Tenn.) 535. So, one who, knowing the signature to a note to be forged, acknowledges is at his own, intending to be bound thereby, is so bound, just as if he had originally authorized the signing. *Wellington* v. *Jackson*, 121 Mass. 157. Vol. 1, p. 233.

The addition of the word "gold" to a promissory note payable in dollars by the principal before its delivery, without the consent of his sureties, is held to be a material alteration, and that no action can be maintained thereon against the sureties. *Bogarth* v. *Breedlove*, 39 Tex. 561. See *ante*, p. 473, Art. 1, § 11.

§ 3. **As to indorsers.** The indorser of a note is not bound by a fraudulent alteration made subsequently to his indorsement, unless through negligence the instrument has been so loosely drawn as to easily

admit of alteration, and in a manner not calculated to place a man of ordinary prudence on the alert. *Capital Bank* v. *Armstrong*, 62 Mo. 59; *Seibel* v. *Vaughan*, 69 Ill. 257. See Vol. 1, tit. *Bills and Notes*.

An alteration shortening the time of payment, made by the maker before negotiating the note, but after A had indorsed it, for the purpose of taking up a previous note of the parties, such alteration being made without A's consent, will discharge the liability of A as indorser. *Bell* v. *State Bank*, 7 Blackf. (Ind.) 456. And see *Haskell* v. *Champion*, 30 Mo. 136; *Bachellor* v. *Priest*, 12 Pick. 399. But where the maker of a promissory note which had been drawn for a certain sum by him, and indorsed for his accommodation by another, afterward altered it to a larger sum, by taking advantage of a vacant space left in the printed form on which it was written, it was held, on a case stated, that the holder was entitled to judgment for the true amount of the note against the indorser. *Worrall* v. *Gheen*, 39 Penn. St. 388.

And it is held that when a note is indorsed in blank, a mistake made by writing over the signature, a contract not authorized by the circumstances, will not discharge the indorser, no fraud being intended. *Seymour* v. *Mickey*, 15 Ohio St. 515. And see *Levi* v. *Mendell*, 1 Duv. (Ky.) 77; *Douglass* v. *Scott*, 8 Leigh (Va.), 43; *Wilson* v. *Henderson*, 9 Sm. & M. (Miss.) 375.

A note was indorsed by the payee and by another person. The maker in good faith, but without the knowledge or consent of the indorsers, inserted the name of the second indorser as a payee in the body of the note, and discounted it, and it was held that the alteration released both indorsers. *Aldrich* v. *Smith*, 37 Mich. 468.

§ 4. **As to indorsees.** To strike out the name of the indorsee, in a full or special indorsement of a promissory note, and substitute the name of another, without the consent of the indorser, is a material alteration of the contract, and no recovery can thereafter be had upon it, against the indorser. *Grimes* v. *Piersol*, 25 Ind. 246.

§ 5. **What are material.** See *ante*, p. 473, Art. 1, §§ 10, 11. An alteration of a negotiable instrument, sufficient to discharge the party bound for the payment thereof, must be made in a material part. And as a general rule, the insertion of words which do not affect the rights or responsibilities of the parties will not render the instrument void, in the absence of any fraudulent intent to change its legal effect. *Kincannon* v. *Carroll*, 9 Yerg. (Tenn.) 11; *Blair* v. *Bank of Tennessee*, 11 Humph. 84; *Humphreys* v. *Crane*, 5 Cal. 173. See *Booth* v. *Powers*, 56 N. Y. (11 Sick.) 22. Thus where an alteration in a prom-

issory note conforms to the true intention of the parties thereto, is honestly made to correct a mistake, and with no intent of procuring any advantage, it will not vitiate the note. The law will presume or dispense with the assent of the maker of the note to such alteration. *McRaven* v. *Crisler*, 53 Miss. 542. See, also, *Conner* v. *Routh*, 7 How. (Miss.) 176; *Newins* v. *DeGrand*, 15 Mass. 436.

Where a negotiable promissory note was made payable on a condition, and the condition was written below the note, on the same piece of paper, it was held that the note and the condition were parts of a single entire contract, and that the fraudulent removal of the condition, by tearing the paper, was such a *material* alteration as rendered the note void in the hands of a *bona fide* holder. *Gerrish* v. *Glines*, 56 N. H. 9. See, also, *Cochran* v. *Nebeker*, 48 Ind. 459; *Benedict* v. *Cowden*, 49 N. Y. (4 Sick.) 396; S. C., 10 Am. Rep. 382. But where the words alleged to have been erased were merely,—"This note is given upon condition,"—and there is nothing to show what the condition was, it was held that, as the words were immaterial, the erasure did not vitiate. *Palmer* v. *Largent*, 5 Neb. 223.

Where one of the makers of a promissory note, after full knowledge of an alteration therein, distinctly and unconditionally promises to pay it, it becomes immaterial whether the alteration was material, as by such act he adopts the note as his own, and is bound to pay it (*Goodspeed* v. *Cutler*, 75 Ill. 534); and partial payments of a promissory note, and with full knowledge of the fact, will be deemed to be a ratification of the alteration. *Evans* v. *Foreman*, 60 Mo. 449. See *ante*, p. 473, Art. 1, § 9.

Where the payee of a note, desiring to transfer it, and being ignorant of the appropriate method, erased his own name and inserted that of the transferee, but subsequently, and before delivery, restored the instrument to its original form and transferred it by indorsement, it was held that the alteration was not material. *Horst* v. *Wagner*, 43 Iowa, 373; S. C., 22 Am. Rep. 255.

§ 6. **Alteration as to consideration.** Where a promissory note which does not state that it is given for any consideration is altered by adding a consideration, the alteration is material. *Lowe* v. *Argrove*, 30 Ga. 129. So, adding the words "with difference of exchange," though made under an honest mistake of right, avoids a note. *Merrick* v. *Boury*, 4 Ohio St. 60. Where two sign a note, and one of them afterward alters it, by increasing the sum payable, without the other's consent, the latter is discharged. *Goodman* v. *Eastman*, 4 N. H. 455. If one of the parties to a note add the words "after due, ten per cent," the alteration is material, and will release a party not ratifying or consenting to the

change. And it is held that the rule holds, even though the alteration be made with honest intent, in order to conform the note to the agreement of the parties. The alteration vitiates the note, regardless of the intention. *Evans* v. *Foreman*, 60 Mo. 449. The fraudulent alteration of a promissory note, by the insertion of words which make it appear to be for a greater sum than that for which it was originally given, avoids the note in the hands of a *bona fide* indorsee for a valuable consideration, although the alteration could not be detected on a careful scrutiny. *Wade* v. *Withington*, 1 Allen, 561. The maker must guard the public against frauds and alterations by refusing to sign negotiable paper in such form as to admit of fraudulent practices with ease, and without ready detection. *Zimmerman* v. *Rote*, 75 Penn. St. 188.

On the settlement of an account, a note was written underneath the same, on the same paper, reciting the account as the consideration. Afterward the note was separated from the account, and the words "on demand" added, and it was held that the alteration was material. *Benjamin* v. *McConnell*, 9 Ill. 536.

It is held to be a material alteration to alter a note in amount (*Bank of Commerce* v. *Union Bank*, 3 N. Y. [3 Comst.] 230; *Greenfield Savings Bank* v. *Stowell*, 123 Mass. 196); even if the amount be diminished. *Portage County Bank* v. *Lane*, 8 Ohio St. 405; *Chism* v. *Toomer*, 27 Ark. 108. The payee may, however, alter the body of the note to make the amount correspond with the margin, where that is correct, and the error was accidental. *Clute* v. *Small*, 17 Wend. 237. And see *Boyd* v. *Brotherson*, 10 id. 93; *Peyton* v. *Harman*, 22 Gratt. 643. So, an alteration of figures in the margin of a note, which were made to conform to the words in the body thereof, was held to be immaterial, these figures not constituting part of the note. *Smith* v. *Smith*, 1 R. I. 398. See *Schryver* v. *Hawks*, 22 Ohio St. 308; *Woolfolk* v. *Bank of America*, 10 Bush (Ky.), 504.

§ 7. **In name of payee.** It is well settled, that rendering a non-negotiable note negotiable, as by the interlineation or insertion of the words "bearer" or "order," is a material alteration (*Bruce* v. *Wescott*, 3 Barb. 374; *Scott* v. *Walker*, Dudley [Ga.], 243); and will avoid the note, even in the hands of a *bona fide* purchaser before maturity. *Morehead* v. *Parkersburg Nat. Bank*, 5 W. Va. 74; S. C., 13 Am. Rep. 636. And in *Booth* v. *Powers*, 56 N. Y. (11 Sick.) 22, it was held that where a note is made payable to the order of A, an alteration by erasing the words "to the order of," and inserting "or bearer," after the payee's name, is a material one, and vitiates the note. See *Williams* v. *Starr*, 5 Wis. 534. But in the English case of *Atwood* v. *Griffin*, 2 Carr. & P. 368, it was held that if an accommodation bill is drawn payable to

"bearer," and after acceptance, the words "or order" are added, the bill is not thereby vitiated, and may be sued on without a new stamp. See *Kershaw* v. *Cox*, 3 Esp. 246; *Knill* v. *Williams*, 10 East, 431.

Before a note payable to the maker's order was indorsed by him, and after its accommodation indorsement by P., the maker, without P.'s knowledge or consent, in negotiating it to S., erased the word "myself," and made it payable to S. This was held to be a material alteration, avoiding P.'s liability. *Stoddard* v. *Penniman*, 108 Mass. 366; S. C., 11 Am. Rep. 363. See *German Bank* v. *Dunn*, 62 Mo. 79.

An alteration by interpolating the words "or bearer" in an instrument in the form of a promissory note, but made expressly subject to the conditions of a mortgage not payable absolutely, but only on certain contingencies, in no way invalidates or changes the legal effect of the instrument. Such an instrument is not negotiable, and the use of the words in question would not make it so. *Goodenow* v. *Curtis*, 33 Mich. 505.

§ 8. **As to time of payment.** The alteration of a note in respect to the time of payment, as by altering the date so as to make it payable in the future, when by the date the time limited had already expired, is a material alteration, and avoids the note as to the parties not assenting thereto. *Owings* v. *Arnot*, 33 Mo. 406; *King* v. *Hunt*, 13 id. 97.

An alteration in the date of a bill of exchange, payable at a specified period after its date, is a material alteration; and where the bill is declared upon with its altered date, the defense is available to the acceptor under a traverse of the acceptance. *Hirschman* v. *Budd*, L. R., 8 Exch. 171; 5 Eng. Rep. 361. An alteration in the date of a note and *cognovit*, so as to make the note fall due one year later, is a material alteration, at least, as to a surety on the note. *Wyman* v. *Yoemans*, 84 Ill. 403.

§ 9. **As to rate of interest.** The addition of an interest clause to a promissory note, or the alteration of the note by increasing the rate of interest, avoids the note as to such promisors as do not consent thereto (*Schnewind* v. *Hacket*, 54 Ind. 248; *Lee* v. *Starbird*, 55 Me. 491); although the alteration is made without fraudulent intent (*Fay* v. *Smith*, 1 Allen, 477; *Harsh* v. *Klepper*, 28 Ohio St. 200; *Warpole* v. *Ellison*, 4 Houst. [Del.] 322); and even in the hands of a *bona fide* holder (*Bradley* v. *Mann*, 37 Mich. 1; *Holmes* v. *Trumper*, 22 id. 427; S. C., 7 Am. Rep. 661; *Washington Savings Bank* v. *Ecky*, 51 Mo. 272); and even though the note was altered before delivery to the payee. *Waterman* v. *Vose*, 43 Me. 504; *Draper* v. *Wood*, 112 Mass. 315; 17 Am. Rep. 92. And altering a note so it should draw interest a month sooner than it did as it was executed, was held to release the surety,

although he had afterward, but without knowledge of the alteration, made a payment on the note. *Benedict* v. *Miner*, 58 Ill. 19. So, where a note was payable in one sum, with "interest annually," it was held to be a material alteration to insert "paid" between "interest" and "annually." *Patterson* v. *McNeely*, 16 Ohio St. 348. See, also, *Dewey* v. *Reed*, 40 Barb. 16. So, adding to a note, with the consent of the maker, the words "interest payable semi-annually," was held to avoid it as to the sureties, and that, at the trial, the payee could not strike out the added words, and recover on the note in its original form. *Fulmer* v. *Seitz*, 68 Penn. St. 237; S. C., 8 Am. Rep. 172. It has, however, been held that filling a blank with the rate of interest will not avoid the note in the hands of a *bona fide* holder. *Rainbolt* v. *Eddy*, 34 Iowa, 440; 11 Am. Rep. 152. And see *Visher* v. *Webster*, 8 Cal. 109.

§ 10. **As to place of payment.** An alteration of a note, by erasure of the place at which it was made payable (*White* v. *Hass*, 32 Ala. 430); or by adding the place of payment (*Woodworth* v. *Bank of America*, 19 Johns. 391; *Major* v. *Hansen*, 2 Biss. 195; *Whitesides* v. *Northern Bank of Ky.*, 10 Bush [Ky.], 501; 19 Am. Rep. 74); is a material alteration (id.); unless a blank be left for it, when the holder may fill it. *Redlich* v. *Doll*, 54 N. Y. (9 Sick.) 234; S. C., 13 Am. Rep. 573. See *American Nat. Bank* v. *Bangs*, 42 Mo. 450.

§ 11. **Altering special stipulations.** Adding special stipulations, as, "without defalcation or set-off," is a material alteration of a promissory note. *Davis* v. *Carlisle*, 6 Ala. 707. So, in a note payable in "merchantable neat stock," an insertion of the word "young" after the word "merchantable," is a material alteration. *Martendale* v. *Follet*, 1 N. H. 95. But the insertion of "good" before the words "merchantable wool," in a note, does not affect it. *State* v. *Cilley*, id. 97. So, where a maker, after indorsement, added "payable before maturity, and interest on unexpired term refunded, if I so elect," it was held not to discharge the indorser. *Herrick* v. *Baldwin*, 17 Minn. 209; S. C., 10 Am. Rep. 161. So, the unauthorized addition of the words "without relief from valuation or appraisement laws," by an agent intrusted with the filling up and negotiation of a blank bill of exchange, will not render it invalid, there being a complete bill of exchange without them. *Holland* v. *Hatch*, 15 Ohio St. 464. And since the statute law of Pennsylvania has destroyed the common-law distinction between the remedies on joint and several instruments, an interlineation of the words "or either of us," in a promissory note, is not a material alteration, necessary to be accounted for by the holder. *Miller* v. *Reed*, 27 Penn. St. 244; S. C., 3 Grant's (Pa.) Cas. 51.

§ 12. **Altering signatures.** See *ante*, pp. 486, 487, §§ 2–4. Signing new names to a promissory note, without the knowledge and consent of one who has already signed it as surety for the maker, is such a material alteration of the instrument as furnishes such surety with a good defense against the note. *Mc Vean* v. *Scott*, 46 Barb. 379. So, an alteration of a promissory note, procured by the payee, by the addition of the name of another party as maker, after its execution and delivery to the payee by the former parties, and without their consent, avoids it as to such original parties. *Bowers* v. *Briggs*, 20 Ind. 139.

But where the payee of an individual promissory note, after its delivery to him, induced another person to sign it, it was held, in an action against the maker by an innocent purchaser, not to be a material alteration, nor one affecting the validity of the note. *Card* v. *Miller*, 1 Hun (N. Y.), 504; S. C., 3 N. Y. Sup. Ct. (T. & C.) 635. So, where a note, given for accommodation, appeared to have been altered after the signature of one maker, by the addition of other names, as joint makers, and also by striking out the words "after date," it was held that these alterations were not sufficient to prevent the note from being a subsisting obligation against the first maker. *Bingham* v. *Reddy*, 5 Ben. (Dist. Ct.) 266. And see *Montgomery Railroad* v. *Hurst*, 9 Ala. 513.

Where the holder of a note made by a principal debtor and sureties, by an arrangement with the principal, suffered the signature of one of the sureties to be erased, it was held that the note was still valid against such principal. *People* v. *Call*, 1 Denio, 120. So, erasing the name of a surety to a joint and several promissory note, by agreement between the surety and the payee, is not such an alteration as will invalidate the note as against the principal; it does not prejudice him. *Huntington* v. *Finch*, 3 Ohio St. 448; *Broughton* v. *West*, 8 Ga. 248.

§ 13. **Adding or removing seals.** Affixing a seal to the name of a party to a written instrument, when its legal effect would be in some way thereby changed, undoubtedly is a material alteration. And where the defendant's note to the plaintiff was altered by the wife of the latter, by affixing seals thereto, without the knowledge or consent of either party to the note, the note was held to be avoided thereby. *Morrison* v. *Welty*, 18 Md. 169. But, affixing a seal to a note after its execution, by a surety, and before it was negotiated to the holder, and without his knowledge or consent, will not avoid the instrument in his hands. *Fullerton* v. *Sturges*, 4 Ohio St. 529.

Where, after the death of a payee, in a sealed note, the note was found among his papers with the seal carefully cut out, leaving only sufficient to show the character of the instrument, it was held that the destruction

of the seal must be considered the act of the payee, and that it vitiated the note. *Porter* v. *Doby*, 2 Rich. (S. C.) Eq. 49.

§ 14. **Altering attestation.** Adding the name of a subscribing witness to a promissory note, when there was none before, in States where the operation of statutes of limitation is thereby affected, is a material alteration (*Homer* v. *Wallis*, 11 Mass. 309); but adding a second witness where there was already one is immaterial, for it does not affect the operation of the statute. *Ford* v. *Ford*, 17 Pick. 418. And it is held in Maine that adding the signature of an attesting witness, where there was none before, does not annul the note, if the alteration was made without any intention to defraud. *Thornton* v. *Appleton*, 29 Me. 298.

Where the payee of a promissory note tore from it the name of the subscribing witness, the alteration was held to be material, and the note thereby avoided. *Sharpe* v. *Bogwell*, 1 Dev. (N. C.) Eq. 115.

§ 15. **Collateral memorandum.** See *ante*, p. 487, § 5. The severance from a promissory note of a memorandum, made at the same time and upon the same paper as the note, and modifying its obligation, if done without the consent of the maker, is a material alteration, and vitiates the note, even in the hands of an innocent holder. *Benedict* v. *Cowden*, 49 N. Y. (4 Sick.) 396; S. C., 10 Am. Rep. 382; *Wait* v. *Pomeroy*, 20 Mich. 425; S. C., 4 Am. Rep. 395. And see *State* v. *Stratton*, 27 Iowa, 420; S. C., 1 Am. Rep. 282. Thus, where a bargain was made as to the terms of payment for land, and a note was thereupon written, payable on demand, and the promisor objected that it was not according to the bargain, and a memorandum was then written on the same paper, according to the bargain, it was held that cutting off this memorandum was a material alteration that avoided the note. *Wheelock* v. *Freeman*, 13 Pick. 165.

But the addition of a date to an indorsement of a partial payment on the back of a note is not an alteration of the instrument. *Howe* v. *Thompson*, 11 Me. 152.

§ 16. **Altering amount.** The alteration of a note in amount is material, except where made in accordance with the original intention of the parties (*Hamelin* v. *Bruck*, 9 Q. B. 306; *Greenfield Savings Bank* v. *Stowell*, 123 Mass. 196; *ante*, p. 488, § 6); and even if the amount be diminished. *Portage County Bank* v. *Lane*, 8 Ohio St. 405; *Chism* v. *Toomer*, 27 Ark. 108.

§ 17. **Presumptions.** See *ante*, p. 474, Art. 1, § 12. The maker of negotiable paper is always presumed, in the absence of evidence, to have issued it clear of all blemishes, erasures and alterations, whether of the date or body of the instrument, and the burden of showing an alteration

apparent upon inspection to have been lawfully made is upon the holder, even though the alteration be beneficial to the maker. *Heffner* v. *Wenrich*, 32 Penn. St. 423; *Neff* v. *Horner*, 63 id. 327; 3 Am. Rep. 555; *Warpole* v. *Ellison*, 4 Houst. (Del.) 322; *Clifford* v. *Parker*, 2 Man. & Gr. 909. But where the defendant alleges an alteration of a note after he signed it, if the alteration be not apparent upon the face of the instrument, the burden is on him. *Meikel* v. *State Savings Institution*, 36 Ind. 355. See *King* v. *Bush*, 36 Ill. 142; *Planters'*, *etc.*, *Bank* v. *Irwin*, 31 Ga. 371; *Jones* v. *Ireland*, 4 Iowa, 63.

§ 18. **Recovering on original consideration.** The general rule is, that if an alteration is made without fraudulent intention, the payee may resort to the original indebtedness, if that was independent of the note, and has not been discharged by the execution of it. *Booth* v. *Powers*, 56 N. Y. (11 Sick.) 22; *Hunt* v. *Gray*, 35 N. J. Law, 227; S. C., 10 Am. Rep. 232. And see *ante*, p. 485, § 1.

## ARTICLE VI.

### ALTERING OFFICIAL PAPERS.

**Section 1. In general.** Alterations in official documents, which have always remained in official custody, are presumed to have been rightly made. *Devoy* v. *New York*, 22 How. (N. Y.) 226; S. C., 35 Barb. 264. And where an officer's return has been interlined, and it does not appear when the interlineation was made, the presumption is that it was made before the officer made his return, as he would be presumed to have done his duty. *Sloan* v. *Stanley*, 11 Ired. (N. C.) Law, 627. See *Gregory* v. *Ford*, 14 Cal. 138.

Where a sheriff, after he had gone out of office, amended a deed that had been given by him while in office, and created no new right by the amendment, it was held that the alteration did not affect the deed, and was good, especially as it was unnecessary. *Flemming* v. *Powell*, 2 Tex. 225.

## ARTICLE VIII.

### ALTERING WILLS.

**Section 1. In general.** Where interlineations or erasures appear in a will, and no mention is made of them at the time of execution, they will be presumed to have been made prior to the act of execution. *Wikoff's Appeal*, 15 Penn. St. 281.

The fact that words appear in a will which are not in the handwriting of the testator is not good cause for annulling the will, if the words

themselves do not change the meaning, nor alter the disposition made by the testator, in his own handwriting. *Heirs of McMichael* v. *Bankston*, 24 La. Ann. 451. See *Malin* v. *Malin*, 1 Wend. 625. And it is held that an alteration of a pecuniary legacy in a will, by the legatee or a stranger, will not avoid the will as to other bequests. *Smith* v. *Fenner*, 1 Gall. (C. C.) 170.

After the due execution of a will of real and personal property, the interlineation of a new pecuniary legacy by the scrivener, at the testator's request, and in the presence of one only of the subscribing witnesses, does not invalidate the will. *Wheeler* v. *Bent*, 7 Pick. 61. And see *Locke* v. *James*, 11 M. & W. 901; *Jackson* v. *Holloway*, 7 Johns. 394. So, an addition of words to a will by interlineation, in the testator's handwriting, after the execution, but at a time not ascertained, by which a bequest of personal property was enlarged, was held to be valid and operative. *Pringle* v. *McPherson*, 2 Desau. (S. C.) 524.

It is held in a recent case in New York that a testator cannot, by obliterations, partially revoke a will duly executed. Thus, the testator, after he had duly executed his will, made, in his own handwriting, various alterations. Some legacies he erased, some he directed to go to other persons, and he also changed one of the executors, and it was held that the will, as originally executed, should be upheld. *Quinn* v. *Quinn*, 1 N. Y. Sup. Ct. (T. & C.) 437. See *McPherson* v. *Clark*, 3 Bradf. (N. Y.) 92; *Ruddy* v. *Ulrich*, 69 Penn. St. 177; S. C., 8 Am. Rep. 238.

# CHAPTER VIII.

## ANOTHER ACTION PENDING.

### ARTICLE I.

#### GENERAL RULES AND PRINCIPLES.

**Section 1. Definition and nature.** It is the professed object of law, both common and statutory, to provide remedies for the enforcement of every right, and the redress of every wrong; but it is careful not to permit its process to be perverted into a means of annoyance or oppression. It sometimes permits separate causes of action to be joined in the same suit, or to be sued separately, at the option of the plaintiff; and sometimes requires that all claims of a similar character be so joined. But it presumes that a single question can be tried and determined by means of a single action; and will not permit a plaintiff to maintain more than one action against the same party for the same cause, at one time. See *Wentworth* v. *Barnum*, 10 Johns. 228; *Harrington* v. *Libbey*, 6 Daly (N. Y.), 259. Certain limitations of this general statement will be noticed hereafter.

If, then, the plaintiff in a suit commences another suit against the same party, for the same cause, the defendant is entitled to take advantage, in the second suit, of the pendency of the first; and the question for our consideration in this article is, in what manner and to what extent can he avail himself of it. The plaintiff, in commencing the first suit, has merely exercised a right guaranteed to him by law, and his attempt to exercise the same right a second time can have no possible effect upon his cause of action. But the pendency of the first must and does affect the present right to maintain the second suit. It is, therefore, usually, though not always, matter in abatement and not in bar, and must be pleaded in abatement, and, under common-law practice, before pleading defenses in bar. *Davis* v. *Grainger*, 3 Johns. 259; *Compton* v. *Green*, 9 How. (N. Y.) 228; *Estep* v. *Larsh*, 21 Ind. 190; *White* v. *Talmage*, 3 Jones & Sp. (N. Y.) 223. And see *Dawley* v. *Brown*, 9 Hun (N. Y.), 461.

Under the practice established by the New York Code, if the pendency of the prior action appears on the face of the complaint, it should

be taken advantage of by demurrer, otherwise by answer. *Bishop* v. *Bishop*, 7 Robt. (N. Y.) 194. See *Clark* v. *Clark*, id. 276. In an action in justice's court, the pendency of a prior action before another justice can be taken advantage of only by answer. *Wright* v. *Maseras*, 56 Barb. 521. If the prior action is for part of an entire demand, its pendency must be pleaded in abatement of an action for the balance. If the prior action has been compromised, but no discontinuance entered, it is still available, as a pending action, in abatement, but not in bar. *O'Beirne* v. *Lloyd*, 1 Sweeny, 19; S. C., 6 Abb. (N. S.) 387.

Formerly, the second suit was deemed *prima facie* vexatious, because unnecessary, and the pendency of the first was absolute ground for abating the second suit; but the modern practice is, not to infer it to be vexatious, but to inquire into the circumstances of the case, and determine that question as a matter of fact. *State* v. *Dougherty*, 45 Mo. 294.

§ 2. **It must be a prior action.** It is only a prior suit that can be pleaded in abatement. The commencement of a new suit for the same cause does not work a discontinuance of one previously commenced, but the pendency of the first may be pleaded in abatement of the second. *Blair* v. *Cary*, 9 Wis. 543; *Wood* v. *Lake*, 13 id. 84; *Ballou* v. *Ballou*, 26 Vt. 673; *Renner* v. *Marshall*, 1 Wheat. 215. A suit in which the jurisdiction of a court of the United States has attached is not liable to be abated by an attachment, subsequently issued in a State court, against the debt or instrument on which the prior suit was brought. *Campbell* v. *Emerson*, 2 McLean (C. C.), 30; *Wallace* v. *McConnell*, 13 Pet. 136.

A prior personal action will not be abated on motion of the defendant, because of the commencement of another suit, even when the parties and cause of action are the same, much less if they are different. *Rizer* v. *Gillpatrick*, 16 Kans. 564. A suit against a carrier for the value of goods consumed in a warehouse is no bar to a prior action against the warehouseman to recover the insurance money received by them on such goods. *Clark* v. *Wilder*, 25 Penn. St. 314.

§ 3. **The action must be pending.** To avail as a ground of abatement of the second suit, the first one must have been pending when the second was commenced, and not merely at the time of trial of the latter. *Hope* v. *Alley*, 11 Tex. 259.

As to when an action is to be deemed commenced, so as to become a pending action, different rules prevail in different parts of this country. In some States the mere issuing of the writ is deemed the commencement of an action; at least, when it is issued with an intention to have it served, and is placed in the hands of an officer for that purpose. *Car-*

*penter* v. *Butterfield*, 3 Johns. Cas. 145; *Ford* v. *Phillips*, 1 Pick. 202; *Thompson* v. *Bell*, 6 Monr. 560; *Day* v. *Lamb*, 7 Vt. 426; *Bronson* v. *Earl*, 17 Johns. 65; *Johnson* v. *Farwell*, 7 Me. 370. In others, the suit is deemed commenced upon the actual service of the process. *Clark* v. *Helms*, 1 Root (Conn.), 487; *Perkins* v. *Perkins*, 7 Conn. 558; *Graves* v. *Ticknor*, 6 N. H. 537.

The plea of a prior suit pending is an affirmative plea, and it is necessary for the defendant who pleads it to establish it affirmatively, and to do so by record evidence. *Fowler* v. *Byrd*, 1 Hemp. 213. Its commencement must, therefore, have become a matter of record, by entry in court or otherwise. *Parker* v. *Colcord*, 2 N. H. 36; *Commonwealth* v. *Churchill*, 5 Mass. 174. But the return of the process makes it a part of the record, and such process and its return is therefore evidence of its commencement.

If the first action is pending at the time the second is commenced, its dismissal or discontinuance, after its pendency has been pleaded in abatement in the latter suit, has in some cases been held insufficient to prevent the abatement of that suit (*Frogg* v. *Long*, 3 Dana [Ky.], 157); even though the plaintiff gave the defendant written notice of the discontinuance of the first before he commenced the second suit. *Gamsby* v. *Ray*, 52 N. H. 513. But other cases hold that the plea must show that the prior action is still pending (*Hixon* v. *Schooley*, 2 Dutch. [N. J.] 461; *O'Beirne* v. *Lloyd*, 1 Sweeny, 19; S. C., 6 Abb. [N. S.] 387); and others still, that the plaintiff may avoid the plea by discontinuing the first suit at least by the time that issue is perfected in the second suit, and it is noticed for trial (*Swart* v. *Borst*, 17 How. [N. Y.] 69); and even that it is a good reply to such plea that the prior action has been dismissed since the plea. *Chamberlain* v. *Eckert*, 2 Biss. 124. Especially where it was dismissed without prejudice. *Trabue* v. *Short*, 5 Cold. (Tenn.) 293.

§ 4. **The prior action must be in a competent court.** In England it has been held that the prior suit, to be available in abatement of the subsequent one, must be in a court not inferior to that in which the second is brought. *Laughton* v. *Taylor*, 6 M. & W. 695; *Brinsby* v. *Gold*, 12 Mod. 204; *Seers* v. *Turner*, 2 Ld. Raym. 1102. But in this country it is deemed sufficient that the court wherein the cause is first brought has jurisdiction to try an action of that class, and render a valid judgment. *Boswell* v. *Tunnell*, 10 Ala. 958; *Johnston* v. *Bower*, 4 Hen. & Munf. (Va.) 487; *Slyhoof* v. *Flitcraft*, 1 Ashm. (Pa.) 171; *Merriam* v. *Baker*, 9 Minn. 40.

The pendency of a statutory arbitration has been held a good ground for abatement of an action between the same parties to recover a demand

included in the submission. *Fahy* v. *Brannagan*, 56 Me. 42. See, also, *Bower* v. *Tallman*, 5 Watts & Serg. 556.

But the pendency of a suit in a court not having rightful jurisdiction will not avail to abate a subsequent suit for the same cause in a court of rightful jurisdiction. *Rood* v. *Eslava*, 17 Ala. 430. Nor will the pendency of a suit, the complaint in which is so defective that no court could properly render judgment upon it, bar the prosecution of another suit for the same cause. *Reynolds* v. *Harris*, 9 Cal. 338.

§ 5. **The action must be one between the same parties.** In order to avail in abatement or bar of a second suit, the prior suit must be between the same parties; and the plaintiff must sue in the same capacity, and the parties stand in the same relation to each other, in both suits. *Casey* v. *Harrison*, 2 Dev. (N. C.) 244; *Thomas* v. *Freelon*, 17 Vt. 138; *Cornelius* v. *Vanarsdallen*, 3 Penn. St. 434; *Wadleigh* v. *Veazie*, 3 Sumn. (C. C.) 165; *Colt* v. *Partridge*, 7 Metc. 570; *Haskins* v. *Lombard*, 16 Me. 140; *Auburn City Bank* v. *Leonard*, 20 How. (N. Y.) 193; S. C., 40 Barb. 119; *Danvers* v. *Dorrity*, 14 Abb. Pr. (N. Y.) 206.

It is no defense to an action for the conversion of bonds intrusted to the defendant for sale, that a prior suit in replevin by another claimant is pending against the defendant, if the plaintiff in the subsequent suit was not made a party thereto, until after he commenced his suit. *Welch* v. *Sage*, 47 N. Y. (2 Sick.) 143. Where a vendor of goods has made a valid election to rescind the sale for fraud, the mere commencement of an action by him against his vendee for the purchase-price is no defense to an action by him against third parties for the conversion of the same goods. *Kinney* v. *Kiernan*, 49 N. Y. (4 Sick.) 164. Where several persons are liable on the same demand, the pendency of a suit against one of them is not good, either in bar or in abatement of a suit against another of them. *Henry* v. *Goldney*, 15 Mees. & W. 494; *Gridley* v. *Rowland*, 1 E. D. Smith (N. Y.), 670. An action for an injunction and receiver, brought for the benefit of all the creditors of an insolvent partnership, is no bar to an action by one creditor for the same purpose, unless the former action has proceeded to judgment. *Lachaise* v. *Marks*, 4 id. 610. Nor can the plea of pendency of a former action be sustained where, in the one case, the action is against a firm, on a joint or firm indorsement, and in the other, is against one of the firm alone, and upon a several liability in which the partnership has no interest, and which can involve it in no responsibility. *Blackburn* v. *Watson*, 85 Penn. St. 241.

An individual creditor of a corporation, who is entitled to enforce his claim against the stockholders, may maintain an action for that pur-

pose, notwithstanding another creditor may have previously commenced proceedings in equity, for sequestration of its property and the appointment of a receiver. *Kincaid* v. *Dwinelle*, 5 Jones & Sp. (N. Y.) 326; S. C. affirmed, 59 N. Y. (14 Sick.) 548. And a creditor, entitled to enforce his claim against the trustees of a corporation jointly and severally liable on account of a failure to file the annual report required by law, may sue one of them severally, notwithstanding the pendency of another action against all the trustees jointly, to enforce their joint liability for making a false certificate that all the capital stock was paid in. *Nimmons* v. *Tappan*, 2 Sweeny (N. Y.), 652.

It has been held in New York that it is a good defense to an action of ejectment, that another action is pending for the same land, in which the parties are identical, except that in the former a co-plaintiff is joined with the plaintiff, who sues alone in the second suit. *Ritter* v. *Worth*, 58 N. Y. (13 Sick.) 627. But generally all the parties must be the same in both suits.

The pendency of an action against two persons to recover possession of lands held by them under a referee's sale, in which they are not alleged to have any joint interest in the same parcel of land, may be pleaded in abatement of subsequent suits against them severally to recover the same lands with *mesne* profits. *Dawley* v. *Brown*, 65 Barb. 107; 9 Hun, 461. But the pendency of a prior suit, wherein some of the defendants in the subsequent suit are defendants, and the plaintiff could be made a party and litigate the matters involved therein, is not good in abatement of the latter suit. *Loyd* v. *Reynolds*, 29 Ind. 299. A partition suit by heirs is no bar to proceedings by the widow of the deceased for admeasurement of dower, although the court has, in such suit, obtained jurisdiction of her rights and interests. *Matter of Sipperly*, 44 Barb. 370.

It is no defense to an action to foreclose a mortgage, that the person for whose benefit it was given has commenced a prior action to rescind the contract of sale, for which the mortgage was part consideration, and to have the same delivered up and canceled. *Pullman* v. *Alley*, 53 N. Y. (8 Sick.) 637. See *post*, p. 502, § 7.

A defendant cannot plead in abatement a prior suit brought by himself against the plaintiff. *New England Screw Co.* v. *Bliven*, 3 Blatchf. (C. C.) 240; *Osborn* v. *Cloud*, 23 Iowa, 104.

§ 6. **The action must be for the same cause.** In addition to the requisites already considered, the prior action must be for the same cause, in order to bar or abate the subsequent one. *Harris* v. *Johnson*, 65 N. C. 478; *Commonwealth* v. *Cope*, 45 Penn. St. 161; *Lore* v. *Truman*, 10 Ohio St. 45. And it must also be of the same nature. Thus,

proceedings *in rem* do not necessarily interfere with those *in personam*, until satisfaction is obtained in one (*The Kalorama* v. *The Custer*, 10 Wall. 204; *Harmer* v. *Bell*, 22 E. L. & Eq. 62); nor do actions on a joint liability with those on a several liability in respect to the same debt (*Sowter* v. *Dunston*, 1 M. & Ry. 508; *Wise* v. *Prowse*, 9 Price, 393; *Newton* v. *Belcher*, 9 Q. B. 612); nor do proceedings to forfeit shares in a stock company, with an action for calls (*Great Northern Ry. Co.* v. *Kennedy*, 4 Exch. 417; *Inglis* v. *Great Northern Ry. Co.*, 16 Eng. L. & Eq. 55); nor do proceedings in bankruptcy, or on a judge's order for payment, with a common-law action for the debt (*Covington* v. *Hogarth*, 7 M. & G. 1030; *Wade* v. *Simeon*, 1 C. B. 610); nor do proceedings in other than common-law courts, with those in a common-law court, unless identical in their scope. *Miles* v. *Inhabitants of Bristol*, 3 B. & Ad. 945; *Foreman* v. *Jeyes*, 5 id. 835; *Davis* v. *Salter*, 2 Cr. & J. 466; *Murphy* v. *Cadel*, 2 Bos. & P. 137.

A common-law action for services in fitting out a vessel for sea, and for wages as master, should not, therefore, be abated or stayed on account of the pendency of an action *in rem* against the vessel to enforce payment of the same demand (*People* v. *Judge of Wayne Cir.*, 27 Mich. 406; S. C., 15 Am. Rep. 195); nor an action for freight-money, on account of the pendency of such a suit against the vessel for non-delivery of freight (*Russell* v. *Alvarez*, 5 Cal. 48); nor an action founded on the master's lien upon freight, on account of the pendency of a suit against the vessel for advances, unless such lien existed at the commencement of the action *in rem*. *Sorley* v. *Brewer*, 1 Daly (N. Y.), 79.

The following are other instances of actions, founded on the same right, which may be maintained simultaneously, because not of the same nature: Actions to enforce mechanics' liens, and actions for the debts on which those liens are founded (*Webb* v. *Van Zandt*, 16 Abb. Pr. [N. Y.] 190; *Gambling* v. *Haight*, 59 N. Y. [14 Sick.] 354); actions upon the primary debt, and actions upon securities given as collateral thereto (*Corn Exch. Ins. Co.* v. *Babcock*, 8 Abb. [N. S.] 256; S. C., 57 Barb. 231); and an action by a purchaser of land at sheriff's sale, for the rents and profits during the time allowed by law for redemption, and one of ejectment to recover possession of the same premises. *Henry* v. *Everts*, 30 Cal. 425.

Unless the two actions appear to be for the same identical cause, they can be prosecuted at the same time. *Kelsey* v. *Ward*, 16 Abb. Pr. (N. Y.) 98. And the question usually is, not whether the debt or claim for which the second suit was brought could have been, but whether it was included in the first action. *Chase* v. *Ninth, etc., Bank*, 56 Penn. St. 355. The pendency of a prior action, in which the plaintiff might

have recovered the property for which the second suit was brought, is no bar to the latter suit, if, when the first was commenced, the plaintiff did not know that the defendant had such property, and, consequently, did not claim it. *Risley* v. *Squire*, 53 Barb. 280. See *Geery* v. *Webster*, 11 Hun (N. Y.), 428, 430. The pendency of one suit by an attorney against his client for services is no bar to a subsequent suit for services not alleged or shown to be the same. *Porter* v. *Ruckman*, 38 N. Y. (11 Tiff.) 210. And the pendency of one action for divorce on the ground of adulteries committed by the defendant is no bar to a second action for divorce founded on adulteries committed by him after the commencement of the first. *Cordier* v. *Cordier*, 26 How. (N. Y.) 187.

The pendency of an action for damages will not prevent the plaintiff therein from setting up the same damages as a counter-claim in a suit afterward brought against him by the defendant therein. *Wiltsie* v. *Northam*, 3 Bosw. (N. Y.) 162. A replevin against a sheriff for goods seized in attachment, and a suit against him by the plaintiff in replevin as assignee of the attachment debtor for the proceeds of perishable goods sold by him, may be prosecuted at the same time. *Witty* v. *Campbell*, 44 N. Y. (5 Hand) 410.

In criminal law, it is held that the pendency of one indictment for a particular offense is no ground for a plea in abatement to another indictment for the same offense, where both are pending in the same court, so as to be under its control; but, otherwise, where they are in different courts. *People* v. *Fisher*, 14 Wend. 9; *Commonwealth* v. *Drew*, 3 Cush. 279; *State* v. *Yarbrough*, 1 Hawks (N. C.), 78.

§ 7. **Whether at law or in equity.** The rule that a plaintiff shall not be permitted to employ two suits, where one will answer, prevails in equity as well as at law. The pendency of an action at law for the same cause is a good defense to a suit in equity, if, in the first, the plaintiff may recover the same damages as in the second, and the equitable relief asked is unnecessary. *Draper* v. *Stouvenel*, 38 N. Y. (11 Tiff.) 219; *Hempstead* v. *Conway*, 6 Ark. 317. A judgment debtor who sues his own judgment creditor, and in such suit attaches the judgment against himself, cannot, while that is pending, sue in equity to set off the same claim against the judgment. *Butler* v. *Wehle*, 4 Hun, 54; 6 N. Y. Sup. Ct. (T. & C.) 241. And while an action for an accounting and settlement is pending between partners, the defendant therein cannot maintain an action against the plaintiff for the same purpose, even though his complaint contains special averments, and asks extended relief, the character of the action remaining unchanged. *Ward* v. *Gore*, 37 How. Pr. 119. And see *Harrington* v. *Libby*, 6 Daly (N. Y.), 259.

A bill for additional and collateral matters, which might have been introduced into the former bill by amendment, is for the same cause, and a plea of the pendency of the former bill is good. *Dickinson* v. *Codwise*, 4 Edw. Ch. 341.

The pendency of a suit in equity for the same money is no ground for the abatement of an action at law, where the result of the second action may be necessary for perfecting the decree in the first (*Kittredge* v. *Race*, 92 U. S. [2 Otto] 116); nor that of a foreclosure suit, for the abatement of a suit at law on the debt, unless by virtue of some statute (*Joslin* v. *Millspaugh*, 27 Mich. 517); nor that of a suit to foreclose a mortgage for non-payment of one installment of interest, for the abatement of another action to foreclose it for the non-payment of the installment next falling due (*Jacobs* v. *Lewis*, 47 Mo. 344); nor that of an action to foreclose a prior mortgage, for the abatement of an action by the subsequent mortgagee, though made a defendant thereto, to foreclose his mortgage (*Fink* v. *Allen*, 4 Jones & Sp. [N. Y.] 350); nor that of an action to establish an equitable title to land, or to quiet title, for the abatement of an ejectment for such land (*Bolton* v. *Landers*, 27 Cal. 104; *Quinn* v. *Quinn*, 27 Wis. 168); nor that of an action of trespass on land, for the abatement of a bill in equity to restrain future trespasses (*Stewart's Appeal*, 56 Penn. St. 413); nor is the pendency of a suit in equity to re-instate a dismissed appeal good cause for the abatement of a suit on the appeal bond, in the absence of any injunction to restrain it. *Evans* v. *Lingle*, 55 Ill. 455. And the pendency of a suit for divorce when necessaries were furnished the wife, is no defense to an action against the husband for the value of those necessaries, if she was not provided for by him, unless alimony had been allowed her. *Johnstone* v. *Allen*, 6 Abb. (N. S.) 306; S. C., 39 How. 506; 3 Daly, 43.

§ 8. **Actions in foreign courts.** The pendency of an action in a foreign court is no bar to a new suit in the country where the defendant resides, for the same cause; neither is it ground for abatement or stay of proceedings therein. *Cox* v. *Mitchell*, 7 C. B. (N. S.) 55; *Bowne* v. *Joy*, 9 Johns. 221; *McJilton* v. *Love*, 13 Ill. 486; *Salmon* v. *Wooton*, 9 Dana, 422; *Chatzel* v. *Bolton*, 3 McCord, 33; *Lyman* v. *Brown*, 2 Curtis (C. C.), 559.

Even the arrest and holding to bail of the defendant in a suit commenced in a foreign country cannot generally be pleaded in abatement of the subsequent suit in the home court. *Maule* v. *Murray*, 7 T. R. 470; *Imlay* v. *Ellefsen*, 2 East, 453.

§ 9. **Actions in State or national courts.** As to the effect of the pendency of a suit in a State court upon one for the same cause in a court of the United States, or the reverse, the decisions are at variance. It

is held in New York that several actions for the same cause may, at the same time, be prosecuted in courts of different States, or in a court of the United States and one of a State not in the same jurisdiction, or perhaps within it; but that the plaintiff cannot use in each court all the remedies and processes allowed by its laws, to the needless vexation of the defendant (*Lorillard F. Ins. Co.* v. *Meshural*, 7 Robt. [N. Y.] 308); and that the pendency of an action in a court of the United States is no bar, and no ground for a stay of proceedings in a new suit in a State court. *Walsh* v. *Durkin*, 12 Johns. 99. And the United States courts hold that the pendency of a suit in a State court is no defense in abatement of an action for the same cause in the United States circuit court. *Loring* v. *Marsh*, 2 Cliff. 311; *Greenwood* v. *Rector*, 1 Hemp. 708. Otherwise, if property sufficient to satisfy the demand has been attached in the action in the State court of another State. *Lawrence* v. *Remington*, 6 Biss. 44. But it is held in New Hampshire that the United States circuit court for the district of New Hampshire is not a foreign court as to courts of that State; and the pendency of a suit in the former court is good in abatement of the suit in the State court. *Smith* v. *Atlantic M. F. Ins. Co.*, 22 N. H. 21.

§ 10. **Actions in another State.** The general rule is, that the pendency of a suit, either at law or in equity, in another State, is not a good plea in abatement to a subsequent suit for the same cause. *Humphries* v. *Dawson*, 38 Ala. 199; *Smith* v. *Lathrop*, 44 Penn. St. 326; *Hogg* v. *Charlton*, 25 id. 200; *Yelverton* v. *Conant*, 18 N. H. 123; *Wood* v. *Lake*, 13 Wis. 84; *Eaton, etc., R. R. Co.* v. *Hunt*, 20 Ind. 457; *Bradley* v. *Bank*, id. 528; *Burrows* v. *Miller*, 5 How. (N. Y.) 51; *Williams* v. *Ayrault*, 31 Barb. 364; *Allen* v. *Watt*, 69 Ill. 655; *Seevers* v. *Clement*, 28 Md. 426; *Davis* v. *Morton*, 4 Bush (Ky.), 442.

It is no defense to an action on a note that one of the plaintiffs has sued thereon in another State, and attached property there sufficient to satisfy the demand. *Hecker* v. *Mitchell*, 5 Abb. Pr. (N. Y.) 453; S. C., 6 Duer, 687. Nor is it a defense to an action by the receivers of an insurance company that the claim has been garnished or attached in a prior action pending in a court of another State, to which the receivers were parties. *Osgood* v. *Maguire*, 61 Barb. 54. Nor does the pendency of an action against a buyer of goods in another State effect an action in New York for the possession of such goods in the hands of the assignee of such purchaser, on the ground of fraud in the transfer. *King* v. *Phillips*, 8 Bosw. (N. Y.) 603.

§ 11. **Effect of pending appeal.** An appeal pending from a judgment dismissing an action is no bar to a cross-action by the defendant. *Lord* v. *Ostrander*, 43 Barb. 337. But an appeal pending from a judg-

ment foreclosing a mortgage is a good defense to an action to set aside the mortgage as a cloud on title, by one who was a party and appeared in the foreclosure action. *Allen* v. *Malcolm*, 12 Abb. (N. S.) 335. And where judgment has been rendered in an action in favor of some of the defendants and against others, and the latter appeal, they can plead the pendency of their appeal in abatement of a subsequent action for the same cause. *Gregory* v. *Gregory*, 1 Jones & Sp. (N. Y.) 1.

§ 12. **Effect of a writ of error.** It has been held in New York that the pendency of a writ of error on a judgment may be pleaded in abatement, but not in bar, of a suit on such judgment. *Jenkins* v. *Pepoon*, 2 Johns. Cas. 312. But in Illinois it is held that the pendency of a writ of error cannot be pleaded in abatement of another action in the same State, unless such writ operates as a supersedeas; nor then, if sued out after the commencement of the second suit. *McJilton* v. *Love*, 13 Ill. 486. And a writ of error brought to reverse a judgment dismissing a bill in chancery, after another bill has been filed by the administrator of the plaintiff, will itself be abated. *Carr* v. *Casey*, 20 Ill. 637.

# CHAPTER IX.

## ARBITRATION AND AWARD.

### ARTICLE I.

#### OF ARBITRATION AND AWARD.

**Section 1. Definition and nature.** Arbitration is an amicable mode of settling disputes by referring them to the decision of one or more individuals mutually agreed upon by the parties. The agreement is called a submission, the persons agreed upon are called arbitrators, and their decision is called an award. The purpose is to avoid needless and expensive litigation, and the object has met with so much favor that statutes have been enacted providing that, in certain cases, the award of arbitrators may be accepted as the judgment of the court in cases depending between the parties. This class of submissions are called statutory submissions, and are regulated by and must conform to the statute.

But common law submissions differ from the former class, in that they are dependent entirely upon the agreement of the parties, and have no validity if either withdraws his assent before an award is made, and in that the award merely has the force of a debt in favor of the person in whose favor it is made, against the other party, and can only be enforced by an action at law thereon, or by application to a court of equity for a specific performance. But, while a common-law award is not a judgment in the strict sense of the word, and cannot be enforced as such, yet, it possesses many of the attributes of a judgment, and in many cases reaches farther, and more effectually settles controversies between parties than would a judgment of a court of law. A court of law can only conclude the parties, as to matters set forth in the declaration under which the judgment is rendered, and only their *legal* rights, leaving all equitable rights still open for adjustment. But an award reaches out and embraces and settles *all* the rights of the parties as to the matters submitted, *both legal and equitable*, and forever settles all controversies pertaining thereto, so that no other human tribunal, as between the parties thereto, and their privies, can ever re-adjudicate them, unless the award is first set aside upon the ground of

fraud or mistake. See *Jones* v. *Welwood*, 9 Hun (N. Y.), 166, 169; *Locke* v. *Filley*, 14 id. 139.

§ 2. **Common law submission.** At the common law, a submission may be made either in writing or by parol, by the agreement of the parties, and an award made in pursuance of a parol submission is as binding upon the parties as one made in writing. A submission by parol implies a promise to submit and abide by the award, and binds both parties as effectually as a written submission could, and places them under the same obligations to each other, and imposes upon them the same liabilities (*Evans* v. *McKinsey*, Litt. Sel. Cas. [Ky.] 262), as to all matters, the title to which can be passed by parol. *Davy* v. *Faw*, 7 Cr. (U. S.) 172. But disputes concerning real estate cannot be submitted by parol, even at common law (*Miller* v. *Graham*, 1 Brev. 448); and such a submission would be unavailing to vest a title to lands, as a right or title thereto can only be vested by deed. The common-law rule may be said to be, that a parol submission is valid and binding except when the controversy relates to land, or to some matter in reference to which the parties could not bind each other by parol. *Valentine* v. *Valentine*, 2 Barb. Ch. 430; *Titus* v. *Scantling*, 4 Blackf. 89; *Shockey* v. *Glasford*, 6 Dana, 9; *Martin* v. *Chapman*, 1 Ala. 278; *French* v. *New*, 28 N. Y. (1 Tiff.) 147; 2 Abb. Ct. App. 209. But, even if the rule were otherwise, relative to submissions relating o land, such submissions would be void under the statute of frauds. *Stark* v. *Cannady*, 3 Litt. (Ky.) 399, 402; *Philbrick* v. *Preble*, 18 Me. 255. It is held that matters relating to the *price* of land may be submitted by parol (*Davy* v. *Faw*, 7 Cr. [U. S.] 172); and it has been held in Pennsylvania that a parol submission as to a boundary line is valid. *Bowne* v. *Cooper*, 7 Watts, 311. See, also, *Orr* v. *Hadley*, 36 N. H. 575. And so is a parol submission as to damages growing out of a contract relating to land (*Carson* v. *Earlywine*, 14 Ind. 256); if the contract itself is valid. *McMullen* v. *Mayo*, 8 Sm. & M. 298. But if the contract, in reference to which the submission is made, is within the statute of frauds, the submission is void. Thus, where "the right to a mill and lumber" was submitted to arbitration by parol, the award was held to be inoperative, the terms of the submission being broader than the statute of frauds would justify, which makes contracts as to leases of lands, for a longer period than one year, not binding unless made in writing. *McMullen* v. *Mayo*, 8 Sm. & M. 298. It is not essential in order to warrant a submission at common law, that any suit should be pending between the parties (*Titus* v. *Scantling*, 4 Blackf. 89); nor is it necessary that there should be an express agreement to abide by the award, as from the submission the law implies such promise. *Valentine* v. *Valentine*, 2 Barb. Ch. 430.

At the common law, unless otherwise specially stipulated by the parties, a submission to arbitration of a pending suit operated as a discontinuance thereof. *Mooers* v. *Allen*, 35 Me. 276; *Crooker* v. *Buck*, 41 id. 355; *Wilson* v. *Williams*, 66 Barb. 209. But if the submission provides for the entry of a judgment on the award, and judgment is entered accordingly, the parties are concluded by their agreement, and cannot be heard to allege that the submission and judgment were not warranted by law. Id.; *Green* v. *Patchen*, 13 Wend. 293. And see *Rogers* v. *Wall*, 6 Humph. (Tenn.) 29; *McMinnville, etc., R. R. Co.* v. *Huggins*, 59 Tenn. 177.

A verbal submission is superseded if a written submission is afterward made (*Symonds* v. *Mayo*, 10 Cush. 39; *Freeman* v. *Beadle*, 2 Root [Conn.], 492); and a submission in writing to three arbitrators will supersede a previous or even a simultaneous submission to two, by parol. *Loring* v. *Alden*, 3 Metc. (Mass.) 576. Provision is made in all the States for the arbitration of disputes between parties, under a rule of court, in which case the award of the arbitrators is adopted as the judgment of the court, and in many of the States this proceeding may be adopted, even though no cause is pending between the parties. But these statutory provisions do not supersede the common-law practice of arbitration, unless expressly so provided; and parties, who do not choose to resort to the statutory method, may conform to the requisites of the common-law practice, and the award will be binding and operative. *Peachy* v. *Ritchie*, 4 Cal. 205; *Peirce* v. *Kirby*, 21 Wis. 124; *Byrd* v. *Odem*, 9 Ala. 755; *Howard* v. *Sexton*, 4 N. Y. (4 Comst.) 157; S. C., 1 Denio, 440; *Overly* v. *Overly*, 1 Metc. (Ky.) 11; *Coffin* v. *Woody*, 5 Blackf. 423; *Conger* v. *Dean*, 3 Iowa, 463. See, also, *Day* v. *Hammond*, 57 N. Y. (12 Sick.) 479; S. C., 15 Am. Rep. 522. And it is held in some of the States that a submission and award, which cannot be sustained under the statute, may yet be good as a common-law submission and award (*Tyler* v. *Dyer*, 13 Me. 41; *Estep* v. *Larsh*, 16 Ind. 82; *Willingham* v. *Harrell*, 36 Ala. 583; *Moore* v. *Barnett*, 17 Ind. 349); but in others it is held, that, where it is evident that the parties *intended* a statutory arbitration, the proceedings must be judged by the statute, and if not sufficient under its provisions, they cannot be sustained as a common-law arbitration. This is upon the principle that the evident intention of the parties must control and that they cannot be bound simply because the proceedings can be sustained when it was evidently their intention only to be bound in a certain other way entirely different in its result and effect (*Deerfield* v. *Arms*, 20 Pick. 480; *Pierce* v. *Kirby*, 21 Wis. 124); and, where it is uncertain whether the parties intended a statutory or a common-

law submission, effect is to be given to their intention as gathered from the submission itself. *Large* v. *Passmore*, 5 S. & R. (Penn.) 51. A submission does not require any particular form of words. It is enough if there is an agreement to abide by the decision of certain persons upon a particular matter. *Kimball* v. *Walker*, 30 Ill. 482; *Willson* v. *Getty*, 57 Penn. St. 266. But, if a statutory submission is intended, the provisions of the statute as to the form and mode of execution must be strictly complied with. Thus, if the statute requires that the submission shall be under seal, the seal is an indispensable requisite (*Hamilton* v. *Hamilton*, 27 Ill. 158), and must be affixed to the instrument by a person having authority to do so (*Madison Ins. Co.* v. *Griffin*, 3 Ind. 277); and if so required must be acknowledged (*Fink* v. *Fink*, 8 Iowa, 313); and an acknowledgment executed by one only of two parties is not sufficient (*Horton* v. *Wilde*, 8 Gray, 425); and a specification of the demand submitted, if so provided, must be annexed to the submission (*Bullard* v. *Coolidge*, 3 Mass. 324; *Pierce* v. *Pierce*, 30 Me. 113); and must be subscribed by the party making it (*Mansfield* v. *Doughty*, 3 Mass. 398); and indeed the statute should in all respects be complied with, and if any imperative provision of the statute is omitted, it vitiates it, and it cannot be treated as a valid statutory submission even though the parties assent to its being so treated (*Francis* v. *Ames*, 14 Ind. 251; *Sargent* v. *Hampden*, 29 Me. 70); nor can a submission as to matters not within the provisions of the statute be regarded as binding although formally submitted by both parties. *Butler* v. *Mace*, 47 Me. 423. In order to be operative as a valid submission it must be mutual, and equally binding upon both parties. Thus, where the consideration for a submission on the part of a son was an undertaking on the part of the other party—his father—to convey certain land which he held in trust under a will, and which he had no legal right to convey, it was held that, as the submission was not binding upon *both* parties, it was not binding as to either. *Yeamans* v. *Yeamans*, 99 Mass. 585. So the submission must have been fairly obtained. If one of the parties was induced to enter into it through the fraud of the others, as by inducing the other party to accept a person as an arbitrator whom he knew to be prejudiced or interested, or where one of the parties is guilty of any species of fraud that induced the other to enter into the submission. *Emerson* v. *Udall*, 13 Vt. 477; *Bulkley* v. *Starr*, 2 Day (Conn.), 552; *Spurck* v. *Crook*, 19 Ill. 415; *Baird* v. *Crutchfield*, 6 Humph. (Tenn.) 171. But in order to invalidate the submission, there must have been a design to deceive, and the other party must have been prejudiced thereby. *Rice* v. *Loomis*, 28 Ind. 399; *Ellmaker* v. *Bulkley*, 16 S. & R. (Penn.) 72

§ 3. **Parties to submission.** Of course, any person of sound mind who is not under any legal disability may bind himself by a submission to arbitration. But, if he enters into a contract of submission on behalf of some other person, it must appear that he had the requisite authority to bind such person in that respect, or that such person, knowing the facts, ratified his acts. The mere fact that two or more persons are jointly interested in a matter, whether as joint contractors, cosureties, tenants in common, joint-owners or as copartners, does not authorize one to bind the other by a submission to arbitration, whether the instrument be under seal or otherwise. *Stead* v. *Salt*, 3 Bing. 101; *Adams* v. *Bankhart*, 1 C. M. & R. 681; *Martin* v. *Thrasher*, 40 Vt. 460; *Karthaus* v. *Ferrer*, 1 Pet. 222. Such a power does not arise out of the relation of joint ownership, joint liability, or even out of the relation of copartnership. *Adams* v. *Bankhart*, 1 Cr. M. & R. 681; *Harper* v. *Fox*, 7 W. & S. 142; *Harrington* v. *Higham*, 13 Barb. 660; *Armstrong* v. *Robinson*, 5 G. & J. (Md.) 412, 422; *Abbott* v. *Dexter*, 6 Cush. 108; *Jones* v. *Bailey*, 5 Cal. 345; *Backus* v. *Coyne*, 35 Mich. 5; *Morrow* v. *Riley*, 15 Ala. 710. In all such cases, *all* the parties who are to be bound by an award must be parties thereto. Vol. 5, p. 133. But a person who is to be affected by an award may, by his assent thereto even after an award is made, be treated as ratifying the act of the party making the submission, so as to make it obligatory upon him, and this may be implied from an acceptance of the fruits of the award with knowledge of the facts. *Buchanan* v. *Corry*, 19 Johns. 137, 141. So, too, in the case of partners, when in order to secure the right of the firm, under a contract, it is necessary that a submission should be made within a certain time, one partner may, in the absence of his copartners, submit the matter to arbitration, and his copartners will be bound thereby unless they afterward seasonably dissent therefrom (*Brink* v. *New Amsterdam Ins. Co.*, 5 Robt. [N. Y.] 104), and in such a case, when the partnership had a right which, by the terms of a contract which it had entered into, it would lose unless a submission was seasonably made, and the other partners were absent so that they could not be consulted in reference to the matter, the submission by one partner would seem to be such a *necessary* act that authority would be implied so as to make his act binding upon the firm. *Ferrer* v. *Oven* 7 B. & C. 427. Generally, however, in the absence of proof of express authority, or a subsequent ratification, a submission by one copartner will be void as to the others (*Martin* v. *Thrasher*, 40 Vt. 460, 465; *Backus* v. *Coyne*, 25 Mich. 5; *Karthaus* v. *Ferrer*, 1 Pet. 222, 228; *McBride* v. *Hagan*, 1 Wend. 327, 337; *Wood* v. *Shepherd*, 2 P. & H. 442, 457), but in all cases the submission will be binding upon the party making

it (*Elliot* v. *Davis*, 2 B. & P. 338; *Strangford* v. *Green*, 2 Mod. 228; *Jackson* v. *Stanford*, 19 Ga. 14; *Armstrong* v. *Robinson*, 5 G. & J. [Md.] 412; *Doe* v. *Tupper*, 4 Sm. & M. 261; *Layton* v. *Hastings*, 2 Harr. [Del.] 147; *Potter* v. *McCoy*, 26 Penn. St. 458), the rule being, that, where one undertakes to submit to an award for another, he shall be bound by it and his bond shall be forfeited, if the person for whom he undertook does not do what the award requires of him. *Shelf* v. *Bailey*, Com. R. 183. Thus, where an attorney for B, concerning matters with C, undertakes with C to submit such matters to arbitration for B, the award will be good to bind the attorney, although inoperative as to B. *Bacon* v. *Dubarry*, Salk. 70; S. C., 1 Ld. Raym. 246. See, also, *Haynes* v. *Wright*, 4 Hayw. (Tenn.) 63.

But whatever the rule may be as it respects the personal liability of an agent, it is well settled that an attorney at law, as such, has authority to submit the cause to arbitration (*Thomas* v. *Hewes*, 2 C. & M. 519; *Faviell* v. *Eastern Counties Railway Co.*, 2 Exch. 344; *Jenkins* v. *Gillespie*, 10 Miss. 31; *Holker* v. *Parker*, 7 Cr. 436), and the submission, although made without the knowledge or authority of his client, is binding upon the latter. Id.; *Morris* v. *Grier*, 76 N. C. 410. And an oral agreement to submit is sufficient, if it appears to have been known, fully understood, and assented to, by the attorney. *Everett* v. *Charlestown*, 12 Allen, 93. See, also, *Stokely* v. *Robinson*, 34 Penn. St. 315.

A corporation may submit a case, or matters of difference between it and an individual or another corporation, and such submission may be made by the officer thereof who is empowered by its by-laws, charter, or by vote of the corporation, to act for it in such matters, and a special resolution or vote is not necessary. *Isaacs* v. *Beth Hamedash Society*, 1 Hilt. (N. Y.) 469; *Tuscaloosa Bridge* v. *Jemison*, 33 Ala. 476. A power to sue and be sued includes the power to arbitrate, that being one of the modes of settling disputes (*Alexandria Canal Co.* v. *Swann*, 5 How. [U. S.] 83); and if a submission is made by an agent without any express authority, yet, if it is shown that the corporation has previously frequently ratified submissions made by him, it will be bound. *Wood* v. *Auburn R. R. Co.*, 8 N. Y. (4 Seld.) 160. The rule is that, where there is a power to contract with a liability upon the contract, there is generally a power to arbitrate, hence it is held that a municipal corporation, or any department thereof, may make a valid submission. *Brady* v. *Mayor of Brooklyn*, 1 Barb. 584; *City of Shawneetown* v. *Baker*, 85 Ill. 563; *Kane* v. *Fon Du Lac*, 40 Wis. 495; *Remington* v. *Harrison County Court*, 12 Bush, 148. The selectmen of a town have been held authorized to submit to arbitration any claim

that they have power to audit and adjust, and the town is bound by the award made (*Dix* v. *Dummerston*, 19 Vt. 262; *Boston* v. *Brazer*, 11 Mass. 447; *Campbell* v. *Upton*, 113 id. 67); and it has been held that an agent of a town, elected to bring and defend suits on behalf of the town, may bind it by arbitration. *Buckland* v. *Conway*, 16 Mass. 396; *Schoff* v. *Bloomfield*, 8 Vt. 472. A guardian may bind his ward by a submission. *Weed* v. *Ellis*, 3 Cai. (N. Y.) 253; *Weston* v. *Stuart*, 11 Me. 326; *Hutchins* v. *Johnson*, 12 Conn. 376. And it seems that the father of a minor child, in a case where the child has been injured, may submit the whole matter of damages done to the infant to arbitration, and if the arbitrators award entire damages for the injury done to the parent, and also for those done to the child, the award is valid, as to both, the parent having a right to receive satisfaction for the injury done to his child as well as for the damage to himself. *Beebe* v. *Trafford*, Kirby (Conn.), 215. And see *Smith* v. *Kirkpatrick*, 58 Ind. 254. An executor or administrator may submit to arbitration all demands in favor of or against the estate he represents, and the award will bind the estate (*Alling* v. *Munson*, 2 Conn. 692; *Bean* v. *Farnam*, 6 Pick. 269; *Swicard* v. *Wilson*, 2 Const. Rep. (S. C.) 218; *Jones* v. *Deyer*, 16 Ala. 221; *Bennett* v. *Pierce*, 28 Conn. 315; *Kendall* v. *Bates*, 35 Me. 357; *Boynton* v. *Boynton*, 10 Vt. 117. But the question whether an executor or administrator can submit matters for or against the estate to arbitration will depend upon the powers which he possesses. If his powers as to the collection or payment of claims are restricted by statute, he possesses no such power. *Clark* v. *Hogle*, 52 Ill. 427. An infant is not bound by an award in pursuance of a submission entered into by him (*Britton* v. *Williams*, 6 Munf. [Va.] 458; *Baker* v. *Lovett*, 6 Mass. 80); nor, unless her common-law disability has been removed by statute, can a married woman be so bound. *Memphis, etc., R.R. Co.* v. *Scruggs*, 50 Miss. 285; *Palmer* v. *Davis*, 28 N. Y. 242. But when she is given the right to contract and to sue or be sued, she will be bound. Id.; *Smith* v. *Sweeney*, 35 N. Y. (8 Tiff.) 291. An officer of the State or National government has no authority to submit matters on their behalf, unless the power is given by statute. *United States* v. *Ames*, 1 Wood. & M. (C. C.) 76. An agent, unless specially authorized so to do., has no authority to enter into a submission on behalf of his principal, and authority to settle a claim does not confer authority upon him to settle it by arbitration. Thus, where the authority of an agent was "if you can honorably and fairly settle with Reynolds for me, out of court, do so; if not, let the court and jury settle," it was held that the agent was not thereby authorized to submit the matter to arbitration, and it

was also held by the court that authority to exercise a reasonable discretion, or to submit to a reasonable sacrifice, did not confer such power. *Scarborough* v. *Reynolds*, 12 Ala. 252. When an agent is specially authorized to submit (*Bullitt* v. *Musgrave*, 3 Gill [Md.], 31); or, where after a submission the principal ratifies his act, the principal is bound. *Wood* v. *Auburn R. R. Co.*, 8 N. Y. (4 Seld.) 160. But the principal, in either of the cases named, is not bound by the agent's ratification or affirmance of the award when made. *Bullitt* v. *Musgrave*, 3 Gill (Md.), 31. After a party has taken and enjoyed large benefits from an award, it is too late for him to object thereto, on the ground that his agent had no written or legal authority to bind him by the submission. *Perry* v. *Mulligan*, 58 Ga. 479. And see *Memphis, etc., R. R. Co.* v. *Scruggs*, 50 Miss. 285.

§ 4. **What matters may be submitted.** At the common law, the title to land cannot be conveyed by award, but the question of title may, under a proper submission, be determined by arbitration and the arbitrators may award that the one shall convey to the other, and upon refusal of the party to convey according to the award, an action upon the bond, if a bond was given, or if not, an action upon the case may be maintained against him for not doing it (Kyd on Awards, 34; 3 Bl. Com. 16; *Hunter* v. *Rice*, 15 East, 100; *Taylor* v. *Parry*, 1 M. & Gr. 604); and now a court of equity will decree a specific performance of an award directing a conveyance of real estate (*McNeil* v. *Magee*, 5 Mas. [C. C.] 244; *Jones* v. *Boston Mill Co.*, 6 Pick. 148; *Ballance* v. *Underhill*, 4 Ill. 453; *McNear* v. *Bailey*, 18 Me. 251); when the submission is under seal and executed with such formalities and conditions that such an award may properly be made. *Akely* v. *Akely*, 16 Vt. 450. Even though an award cannot of itself give a title to land, yet it may settle a controversy relating thereto, and will preclude the person against whom it is given from disputing the title in an action of ejectment. *Doe* v. *Rosser*, 3 East, 15. In such cases the party is estopped by his own agreement from disputing the other party's title. *Shelton* v. *Alcox*, 11 Conn. 240; *Shepard* v. *Ryers*, 15 Johns. 497; *Whitney* v. *Holmes*, 15 Mass. 152. The award does not have the operation of conveying the land, but it concludes him, by his own agreement, from disputing the other party's title (*Morris* v. *Rosser*, 3 East, 15); and thus, the effect of the common-law rule is practically destroyed, or, rather, overcome, and now, whenever the parties by their own act transfer real property or exercise any act of ownership respecting it, they may refer any dispute concerning it to arbitration, and the arbitrators may order any act to be done by either, which the parties have power to do by agreement. *Blair* v. *Wallace*, 21 Cal. 317. The

award itself does not pass the title, but it may be set up by way of estoppel, or may, in a proper case, be specifically enforced by a court of equity. *Parmalee* v. *Allen*, 32 Conn. 115; *Williams* v. *Warren*, 21 Ill. 541; *Philbrick* v. *Preble*, 18 Me. 255; *Hodges* v. *Saunders*, 17 Pick. 470. It is held that even a parol submission in regard to real estate is valid if the contract as to the real estate between the parties to the award is itself binding (*McMullen* v. *Mayo*, 8 Sm. & M. 298); and in all cases, where the submission only relates to the payment of money, the fact that the controversy relates to real estate does not invalidate the award, even though the submission is by parol, if the contract to which the submission relates is not within the statute of frauds. And where the submission is in writing and under seal, the title to real estate may be settled under it. *Page* v. *Foster*, 7 N. H. 392; *Carey* v. *Wilcox*, 6 id. 177. Although arbitrators cannot award land so as to pass the title (*Den* v. *Allen*, 2 N. J. Law, 34, 48), yet they may award that one party shall convey it to the other, and the award, being treated as a contract between the parties, will be specifically enforced. *Imlay* v. *Wikoff*, 4 N. J. Law, 132. Where the award relates to the boundaries of land, it should fix the lines so distinctly that an officer would have no trouble in ascertaining and giving possession of the premises and designating its limits and bounds. *Aldrich* v. *Jessiman*, 8 N. H. 516. Any matter growing out of a legal contract may be submitted to arbitration, but as the parties cannot, by any act of theirs, give validity to an illegal transaction, it follows as a matter of course that a submission involving matters void for illegality, or as being against public policy, cannot be made the subject-matter of a submission to arbitration, nor will a submission be upheld where part of the matters have been made the subject-matter of an indictment (*Watson* v. *McCullum*, 8 T. R. 520); nor can criminal matters be submitted (*Janes' Case*, 1 Leon, 203; *Mason* v. *Watkins*, 2 Vent. 109); nor can the question be submitted whether a man shall marry a certain woman, because such a submission is against public policy, as all marriages ought to be free. 1 Bac. Abr. 304. But damages resulting from the breach of a contract to marry, as well as any thing relating to a marriage portion, may be submitted. Id. It was formerly held that debts due under a specialty could not be submitted, nor any matter that was involved in a judgment. But this rule no longer prevails, and it is now held that matters growing out of contracts under seal, or even matters of record, may be submitted to arbitration, as a suit upon or matters relating to an administration bond (*Stout* v. *Commonwealth*, 2 Rawle [Penn.], 341); or debt on a bail recognizance (*Stevenson* v. *Docherty*, 3 Watts, 176); or a *scire facias* upon a judgment upon an award. *Hill*

v. *Crawford*, 8 S. & R. 477. A certain and fixed debt, against which there is no claim of off-set, and to which there is no defense, is held not to be discharged by an award, when no other matter is submitted, as the end and design of an arbitration is, to reduce uncertain debts and duties *to a certainty*, and where it is certain before arbitration, there is no mutuality in the submission and the agreement *is a nudum pactum.* Rolle's Abr. 264. But, if the sum due to one man is certain, and he submits it *with other matters that are not certain*, the award will be good, although he is awarded only a part of the sum (*Godfrey* v. *Godfrey*, 2 Mod. 303); and, generally, things which by themselves cannot be submitted, may, when joined with others which may be, form the basis of a valid award. *Coxall* v. *Sharp*, 1 Keb. 937; *Morris* v. *Creach*, 1 Lev. 292; *Sower* v. *Bradfield*, Cro. Eliz. 422. Generally it may be said that all matters of difference growing out of contracts, or differences relating to things real or personal, as well as matters involving the question of liability, or of damages in actions *ex delicto*, such as trespass, trover conspiracy, actions for a nuisance, for negligence, etc., may be submitted to arbitration; and an award made in pursuance thereof will be binding upon the parties. *Noble* v. *Peebles*, 13 S. & R. 319; *Peytoe's Case*, 9 Coke, 78; *DeLong* v. *Stanton*, 9 Johns. 38. But when a submission is made under a statute, it cannot embrace matters that are excepted by the statute, so that, in determining whether a certain dispute can be made the subject of statutory arbitration, the statute itself should be consulted to ascertain whether the matter is excepted under its provisions.

§ 5. **Of agreements to submit.** A mere agreement to submit certain matters to arbitration does not amount to a submission, nor can it be specifically enforced (*King* v. *Howard*, 27 Mo. 21; *Agar* v. *Macklew*, 2 Sim. & Stu. 418), nor can it be set up as a defense to an action either at law or in equity. But where, by the terms of a contract, it is agreed that no action shall be brought until the damages are fixed by arbitration, the condition is valid and must be substantially complied with before an action will lie (*Morton* v. *Cameron*, 3 Robt. [N. Y.] 189), as where a building contract provides that all disputes respecting "the work or finish of the building" shall be submitted to arbitration. *Haggart* v. *Morgan*, 5 N. Y. (1 Seld.) 422. And see *Strohmaier* v. *Zeppenfeld*, 3 Mo. App. Rep. 429. So, a condition in a policy of insurance providing that, in case of loss, any disagreement *as to the amount thereof* shall be submitted, is valid and no action can be brought upon the policy unless this condition is complied with, or a waiver or some other legal excuse for non-compliance is shown. *Mentz* v. *Armenia Fire Ins. Co.*, 79 Penn. St. 478; 21 Am. Rep. 80; *Ins. Co.* v. *Morse*,

20 Wall. 445; *Scott* v. *Avery*, 5 H. L. Cas. 827; *Trott* v. *City Ins. Co.*, 1 Cliff. (C. C.) 439; *Braunstein* v. *Accidental Ass. Co.*, 1 B. & S. 782; *Wright* v. *Ward*, 24 L. T. (N. S.) 439; S. C., 20 W. R. 21. But where such a condition goes to the very foundation of the action, and operates to oust the jurisdiction of the courts, it is void as being against the policy of the law, and an action may be brought without offering to comply with the condition. Thus, in *Goldstone* v. *Osborne*, 2 C. & P. 550, one of the conditions of a policy of insurance was that if any difference should arise on any claim, it should be immediately submitted to arbitration, and, after directing how the arbitrators should be chosen, provided that no compensation should be payable until after an award had been made determining the amount thereof. It was held that this condition was only operative as to the amount of damages and that, if the insurers denied *any liability* under the policy, an action might be brought without complying with the condition (see, also, *Mentz* v. *Armenia Fire Ins. Co.*, 79 Penn. St. 478; S. C., 21 Am. Rep. 80), because the tendency of such a provision would be to oust the jurisdiction of the courts. *Gray* v. *Wilson*, 4 Watts, 41; *Roper* v. *Lendon*, 1 El. & El. 825; *Tredwen* v. *Holman*, 1 H. & C. 72; *Rowe* v. *Williams*, 97 Mass. 163; *Lowndes* v. *Earl of Stamford*, 18 Q. B. 425. If, however, *after* a loss, the parties submit *all* questions to arbitration, and there is no fraud, the award is binding, and the same rule applies to all contracts containing such a provision. *Kynaston* v. *Liddell*, 8 Moore, 223; *McDermott* v. *U. S. Ins. Co.*, 3 S. & R. (Penn.) 604; *Zallee* v. *Laclede, etc., Ins. Co.*, 44 Mo. 530. The courts will not interfere if the parties see fit to resort to such a tribunal voluntarily, but it will not compel them to do so. *Patterson* v. *Triumph Ins. Co.*, 64 Me. 500.

The parties to an arbitration have the right to submit a portion only of the subjects involved, and an award will not be set aside for not including matters not brought to the attention of the arbitrators. *Jones* v. *Welwood*, 71 N. Y. (26 Sick.) 208.

§ 6. **Revocation.** All common-law submissions to arbitration, whether by parol, in writing or by deeds, are revocable, even though the parties expressly agree that they shall not be. No stipulation in such agreements will be sustained, either at law or in equity, which deprives a party from having recourse to courts of justice to settle his differences, if he so elects; consequently, independent of some statutory restriction, an agreement of this character cannot be made irrevocable (*Marsh* v. *Packer*, 20 Vt. 198; *Davis* v. *Maxwell*, 27 Ga. 368; *Johnson* v. *Andress*, 5 Phil. [Penn.] 8; *Tohey* v. *County*, 3 Story [C. C.], 800); and this right may be exercised *any time before the award is actually*

*made* (*Leonard* v. *House*, 15 Ga. 473; *Allen* v. *Watson*, 16 Johns. 205; *Bray* v. *English*, 1 Conn. 198; *Aspinwall* v. *Tousey*, 2 Tyler [Vt.], 328); and by such revocation he annuls all contracts relative to the submission, and leaves the other party to rest entirely on the penalty of the bond, if there is one, or to his remedy upon the case, if no bond was entered into. *Pond* v. *Harris*, 113 Mass. 114; *Aspinwall* v. *Tousey*, 2 Tyler (Vt.), 328; *Miller* v. *Junction Canal Co.*, 53 Barb. 590; *Craftsbury* v. *Hill*, 28 Vt. 763; *Brown* v. *Leavitt*, 26 Me. 251. In Pennsylvania it has been held that, where by agreement of the parties, proceedings in chancery for an account were discontinued, and in consideration thereof a submission to a final reference under the statute was made, that the submission was irrevocable (*McGheehen* v. *Duffield*, 5 Penn. St. 497); and the same rule prevails in Maryland with the further provision that even the parties by consent cannot revoke the rule without leave of court. *Phillips* v. *Shipley*, 1 Bland, 516. But it will be found in reference to statutory arbitrations, that the question of the right of revocation will depend upon the provision of the statute itself, in that respect. *Montgomery County* v. *Carey*, 1 Ohio St. 463; *Bloomer* v. *Sherman*, 5 Paige, 575; *Heath* v. *President of Gold Exchange*, 38 How. Pr. 168. After an award is made and published, neither party can revoke the submission without the consent of the other (*Marsh* v. *Parker*, 20 Vt. 198; *Clement* v. *Hadlock*, 13 N. H. 185); and in New York it has been held that, after the case has been argued and submitted to the arbitrator, the power of revocation is lost (*Bank of Monroe* v. *Widner*, 11 Paige's Ch. 529); and this seems to be in accordance with the provisions of the statute as now existing in that State. *Heath* v. *New York Gold Exchange*, 38 How. 168; S. C., 7 Abb. (N. S.) 251. If the submission is by parol, it may be revoked by parol, but the party must give distinct notice of revocation 1 Bac. Abr. 306; *Keyes* v. *Fulton*, 42 Vt. 159. A submission in writing can only be revoked in writing (*McFarlane* v. *Cushman*, 21 Wis. 401; *Mullins* v. *Arnold*, 4 Sneed (Tenn.), 262; *Evans* v. *Cheek*, 3 Hayw. 42; *Van Antwerp* v. *Stewart*, 8 Johns. 125); and where the submission is under seal, it has been held that the revocation must also be under seal (*Brown* v. *Leavitt*, 26 Me. 251; *Wallis* v. *Carpenter*, 13 Allen, 19); and it has been held that a parol agreement between the parties to waive and abandon an award, made under a submission under seal, cannot be plead in bar to an action on the bond. *Braddick* v. *Thompson*, 8 East, 344. A revocation is presumed from the fact that one of the parties brings an action against the other after a submission is entered into. *Peters* v. *Craig*, 6 Dana, 307. If the submission is made by one party on one side, and

two on the other, *one* of the two cannot revoke it without the assent of the other. *Robertson* v. *McNiel*, 12 Wend. 578; 1 Bac. Abr. 308. The death of one of the parties to the submission operates as a revocation *per se* (*McIntire* v. *Morris*, 14 Wend. 90; *Bristow* v. *Binns*, 3 D. & R. 184; *Cooper* v. *Johnson*, 2 B. & Ald. 394; *Potts* v. *Ward*, 1 Marsh. 366); unless otherwise expressly provided in the articles of submission (*Macdougall* v. *Robertson*, 2 Y. & J. 11; *Wrightson* v. *Bywater*, 3 M. & W. 199); so the marriage of a *feme sole*, after submission and before award, puts an end to the powers of the arbitrators (1 Bac. Abr. 309); and if she gave a bond, her bond is thereby forfeited, but it seems that the forfeiture may be saved by the husband and wife offering to submit again. *Charnley* v. *Winstanley*, 5 East, 266; *Samin* v. *Norton*, 3 Keb. 9. The bankruptcy of one of the parties may or may not operate as a revocation according to the provisions of the bankrupt law. If the claims involved in the admission are proved or allowed in the bankrupt court and the assignee does not make himself a party to the submission, the bankruptcy proceedings will supersede the award. *Rex* v. *Bingham*, 2 Tyrw. 46. A revocation upon a condition is a complete revocation and takes away the powers of the arbitrator (*Crofoot* v. *Allen*, 2 Wend. 494); and after a revocation, the party cannot withdraw the same and permit the arbitrator to proceed so as to save the forfeiture of his bond, or his liability for the expenses of the other party. *Nungate* v. *Digelder*, 2 Keb. 10; *Noble* v. *Harris*, 3 id. 745. If either of the arbitrators refuses to act, the submission becomes abortive, and both parties are released therefrom (*Wooley* v. *Clark*, 2 D. & R. 158; *Blundell* v. *Brettargh*, 17 Ves. Jr. 242); unless provision is made for such a contingency by agreeing upon a substitute. In some of the States the statute makes provision for this contingency. *Wilson* v. *Cross*, 7 Watts (Penn.), 495; *Binsse* v. *Wood*, 47 Barb. 624. In Massachusetts, it is held that, under the statute, the award must be made by the arbitrators named in the rule, and that the parties cannot, even by an agreement in writing indorsed upon the rule, substitute another. *Woodbury* v. *Proctor*, 9 Gray, 18. But in Virginia the right of substitution is recognized. *Ross* v. *Pleasants*, Wythe, 147. The notice of revocation is sufficient if it is sufficiently definite to give the other party to understand that such is his intention. *Frets* v. *Frets*, 1 Cow. 335.

§ 7. **Who may be arbitrators.** The parties, *knowing the facts*, may submit their differences to any person whether he is interested in the matters involved (*Monongahela Nav. Co.* v. *Fenton*, 4 W. & S. [Penn.] 205); or is related to one of the parties, and the award will be binding upon them, and knowledge of such facts coming to them after the

submission is made, but while there is still power to revoke, if he neglects to revoke the submission but permits the award to be made, he is treated as having waived the objection and is bound by the award. *Davis* v. *Forshee*, 34 Ala. 107. But if the facts were unknown to one of the parties the objection would be fatal to the award. *Brown* v. *Leavitt*, 26 Me. 251; *Hicks* v. *McDonnell*, 99 Mass. 459. Infants, unmarried women, and indeed any person of ordinary discretion may be an arbitrator, because every person must use his own discretion, and being at liberty to choose whom he likes best, he cannot afterward object to the want of honesty or of understanding in them, or that they have not done him justice. 1 Bac. Abr. 317.

§ 8. **General powers and duties.** There is a broad distinction between the powers of arbitrators under a common-law submission, and those appointed under a statute, and this distinction must not be lost sight of. In a common-law submission the arbitrators are not required to be sworn, nor are they bound to conform to the rules of law or equity in the admission of evidence, or in arriving at a result. So long as they keep within the limits of the submission and do not act corruptly, and there is no fraud or evident mistake, their decision is conclusive. *Brown* v. *Bellows*, 4 Pick. 179, 192; *Todd* v. *Barlow*, 2 Johns. Ch. 551. They have the power to decide upon both the law and the fact, and neither party can complain that they have made a mistake in either respect. *Mitchell* v. *DeSchaamps*, 13 Rich. 9; *Memphis, etc., R. R. Co.* v. *Scruggs*, 50 Miss. 285; *Mickles* v. *Thayer*, 14 Allen, 114; *Portland Manuf'g Co.* v. *Fox*, 18 Me. 117; *Crabtree* v. *Green*, 8 Ga. 8; *Conrad* v. *Johnson*, 20 Ind. 421. They are at liberty to decide according to equity and good conscience irrespective of the rules of law (*Bliss* v. *Rollins*, 6 Vt. 529); and in a case where an action of slander was submitted, and the arbitrators awarded damages for words not actionable, the court refused to interfere (*Shephard* v. *Watrous*, 3 Cai. [N. Y.] 166); and the rule generally is, both at law and in equity, that arbitrators are clothed with authority to decide the questions submitted to them, and that, if their authority has been fairly exercised, their decision cannot be revised. To warrant the court in reviewing their action upon the merits something more than error of law or of judgment as to the facts must be established. It must appear either that they have transcended their powers, or have committed a mistake so gross and palpable as to evince partiality, corruption or grave misconduct (*Wynn* v. *Bellas*, 34 Penn. St. 160; *Perkins* v. *Giles*, 53 Barb. 342; *Wade* v. *Powell*, 31 Ga. 1; *Mulder* v. *Cravat*, 2 Bay [S. C.], 370; *Bennett* v. *Russell*, 34 Mo. 524; *Webber* v. *Ives*, 1 Tyler [Vt.], 441; *Goldsmith* v. *Tilly*, 1 H. & J. [Md.] 361; *Bell* v. *Price*,

22 N. J. L. 578; *Wheatley* v. *Martin*, 6 Leigh [Va.], 62; *Aspley* v. *Thomas*, 17 Tex. 220; *Brown* v. *Green*, 7 Conn. 536; *Bridgman* v. *Bridgman*, 23 Mo. 272); resulting in an injury to the party seeking to avoid their action (*Daniels* v. *Willis*, 7 Minn. 374; *Pomroy* v. *Kibbee*, 2 Root [Conn.], 92; *Davy* v. *Faw*, 7 Cr. 171; *Tomlinson* v. *Hammond*, 8 Iowa, 40); as a party benefited by a mistake has no reason to complain. *Galvin* v. *Thompson*, 13 Me. 367; *Lyman* v. *Arms*, 5 Pick. 213; *Macon* v. *Crump*, 1 Call. [Va.] 575; *In re Bradshaw*, 12 Q. B. 562.

Since the arbitrators are *personally* trusted by the parties, with the authority to act for them in reference to all the matters submitted, they have no power to transfer their duties to another; consequently, an award that the parties shall abide by the determination of some other person named by them is void, for two reasons: *first*, because it leaves the parties to abide by the judgment of a person not selected by them; and, *secondly*, because the award is uncertain and indeterminate. *Cookson* v. *Ogle*, Lutw. 550; *Winch* v. *Saunders Case*, 2 Roll, 214; *Levezey* v. *Gorgas*, 4 Dall. (Pa.) 71. But while the arbitrators cannot delegate to another any of their judicial powers, they may award that others shall do a certain ministerial act in subserviency to their awards. *Moore* v. *Barnett*, 17 Ind. 349; *Thorp* v. *Cole*, 2 Cr. M. & R. 367; S. C., 4 Dowl. (P. C.) 457. Thus, an award directing that one of the parties should pay a certain sum per acre, for every acre of land, to be measured by an able measurer in the presence of the arbitrators, at the rate of so many yards to the pole, would be good, for it is only a ministerial act. *Hunter* v. *Bennison*, Hardres, 43. So an award that certain releases, conveyances or securities shall be executed according as counsel may advise, has also been held good. *Cater* v. *Startute*, Styles, 217; Rolle's Abr. (Arbitration, 1 and 5). And see *Harvey* v. *Shelton*, 7 Beav. 455; *Moore* v. *Barnett*, 17 Ind. 349. But the rule is otherwise where the award provides that such instruments shall be executed as a person not a counselor shall advise. *Emery* v. *Emery*, Cro. Eliz. 726. The arbitrators may *recommend* that the parties shall do such things as a stranger may direct or advise, because if the parties do not comply, it is mere surplusage, not being a delegation of authority. 1 Bac. Abr. 323. So, the arbitrators must exhaust their power in the award. That is, they must do all that they intend to do; they cannot reserve power in themselves to do other or further acts, as this would enable them to make a double award (Rolle's Abr. 256; *Warley* v. *Beckwith*, Hob. 218; *Winch* v. *Sanders*, Cro. Jac. 584), and does not definitely and certainly settle the differences of the parties. Id.

The power of arbitrators is exhausted when they have once made an

award, and a second award is void. *Bayne* v. *Morris*, 1 Wall. 97; *Doke* v. *James*, 4 N. Y. 568. But if a parol award is made, it is not vitiated by an attempt to subsequently reduce it to writing. *Harden* v. *Harden*, 11 Gray, 435. They cannot make their award in parcels, at different times. Thus, if parties submit all debts, trespasses, etc., to them, they cannot make an award relating to the debts at one time, and an award relating to the trespasses at another; but, of course, they may deliberate in reference to one thing one day, and another upon another day, and then make their award as a whole (1 Bac. Abr. 318); and, unless otherwise specially provided in the submission, the award may be made when the parties are not present. *Withers* v. *Drew*, Cro. Eliz. 676; *Zell* v. *Johnston*, 76 N. C. 302. If two or more arbitrators are chosen, all must act, and all must concur in the award, and an award made by a majority, unless specially so provided in the submission, or to be inferred from the manner or circumstances of the submission, will not bind the parties. *McCrary* v. *Harrison*, 36 Ala. 577; *Hobson* v. *McArthur*, 16 Pet. 182; *Norfleet* v. *Southall*, 3 Murph. 189; *Hoff* v. *Taylor*, 5 N. J. Law, 829. But if the parties agree that the acts of a majority shall bind, the majority having notified *all* the arbitrators of the time and place of hearing, may proceed and hear the parties and make an award, if the other arbitrator refuses to attend. *Crofoot* v. *Allen*, 2 Wend. 494. It is not necessary that the arbitrators should agree upon every question that arises during the progress of the hearing, such as relates to the admission or rejection of evidence, and similar questions. It is enough if they agree in the final award (*Campbell* v. *Western*, 3 Paige, 124); and after an arbitrator has signed the award, he will not be permitted to say that he did not concur in its provisions. *Campbell* v. *Western*, 3 Paige, 124. In Massachusetts it has been held that where land was to be conveyed according to the appraisal of three arbitrators, the appraisal of two, in the presence of the third, is binding, although the appraisal is not concurred in by him. *Phippen* v. *Stickney*, 3 Metc. (Mass.) 384. But this is not the general rule, nor is it consistent with the principles underlying the law applicable to arbitrations; and, unless otherwise agreed in the submission, all must concur in the award, or it is not operative and binding upon the parties (*Hobson* v. *McArthur*, 16 Pet. 182; *McCrary* v. *Harrison*, 36 Ala. 577; *Harryman* v. *Harryman*, 43 Md. 140); though a different rule prevails where authority is confided to several persons in matters of *public* concern. If a power be of a public nature, the majority may perform the act delegated, the power being considered joint and several. *Eames* v. *Eames*, 41 N. H. 177; *Gas Company* v. *Wheeling*, 8 West Va. 320; *Patterson* v. *Leavitt*, 4 Conn. 50; *Young* v. *Buckingham*, 5 Ohio, 485; *Sinclair*

v. *Jackson*, 8 Cow. 543; *Withnell* v. *Gartham*, 6 Term R. 388. Unless the submission expressly shows that the parties intended that the arbitrators should decide the questions in dispute without the aid or presence of the parties, or it is evident that such was the intention, as, where the matter is merely one of appraisal (*Bushey* v. *Cullen*, 26 Md. 534; *Collins* v. *Vanderbilt*, 8 Bosw. 313; *Miller* v. *Kennedy*, 3 Rand. 2); the arbitrators must give both parties notice of the time and place of meeting, and they have no authority to proceed *ex parte* (*Bullitt* v. *Musgrave*, 3 Gill [Md.], 31; *Armstrong* v. *United States*, 1 Dev. Ct. of Claims, 22; *Webber* v. *Ives*, 1 Tyler [Vt.], 441; *Upshaw* v. *Hargrove*, 6 Sm. & M. 286; *Frey* v. *Vanlear*, 1 S. & R. 435); and, where the parties are entitled to notice in the first instance, they are entitled to notice of the time and place of any subsequent hearing, and it is improper, and will invalidate the award, if the arbitrators make an examination, or hear testimony at the request of one of the parties, without notice to the other. *Collins* v. *Vanderbilt*, 8 Bosw. 313; *Chaplin* v. *Kirwan*, 1 Dall. 187; *Peters* v. *Newkirk*, 6 Cow. 103; *Blanton* v. *Gale*, 6 B. Monr. 260. But if the parties appeared, the fact that notice was not given of the time and place of meeting is no objection. The parties are treated as having waived notice. *Madison Ins. Co.* v. *Griffin*, 3 Ind. 277; *Shockey* v. *Glasford*, 6 Dana (Ky.), 9. If the submission fixes the time when the hearing shall be had, the parties are entitled to no other notice, and the hearing cannot be adjourned, if one of the arbitrators does not attend, by the arbitrator who does attend, to any other time, without the consent of the parties. *Weir* v. *Johnston*, 2 S. & R. (Penn.) 459. But when the arbitrators attend at the time and place named, and there is no limitation upon their powers in this respect in the submission, they may adjourn the hearing because of the absence of one of the parties (*Stiles* v. *Carlisle, etc., Turnpike Co.*, 10 id. 286); or for any reason in their discretion. *Steeley* v. *Irvine*, 6 id. 128; *Boring* v. *Boring*, 2 West Va. 297; *Deputy* v. *Butts*, 4 Harr. (Del.) 352. If one of the arbitrators does not appear at the time appointed for hearing, their power is not determined, but they may appoint a new time within a reasonable time, unless the submission is revoked. *Harrington* v. *Rich*, 6 Vt. 666. But in Pennsylvania it is held that unless the parties *appear* at such new session, their power is determined. *Weir* v. *Johnston*, 2 S. & R. 459.

Unless the statute gives them that power, arbitrators cannot administer an oath to witnesses (*People* v. *Townsend*, 5 How. [N. Y.] 315); but in some of the States that power is accorded to them by statute. *Imlay* v. *Wikoff*, 4 N. J. Law, 132. In some of the States the arbitrators are required to be sworn, and when such a requirement exists, it must be

complied with, or their award will be invalid (*Jackson* v. *Steele*, Sneed [Ky.], 29; *Otis* v. *Northrup*, 2 Miles [Penn.], 350); unless the parties have waived the oath (*Woodrow* v. *O'Conner*, 28 Vt. 776; *Howard* v. *Sexton*, 1 Denio, 440); and such waiver may be implied from the fact that the parties, knowing the fact, proceeded without objection. *Winship* v. *Jewett*, 1 Barb. Ch. 173. But under a common-law submission the arbitrators are not required to be sworn. *Bradstreet* v. *Erskine*, 50 Me. 407; *Howard* v. *Sexton*, 4 N. Y. (4 Comst.) 157. Arbitrators have authority to inquire and act in reference to any matter submitted to them (*Maynard* v. *Frederick*, 7 Cush. 247); but they have no power to act in reference to any matter not submitted to them, and their action upon such matters is utterly void. *Harrington* v. *Brown*, 9 Allen, 579. It is, however, held that if the decision of a question submitted to arbitrators involves the decision of another question not submitted, their decision of the latter is not error. *Zell* v. *Johnston*, 76 N. C. 302. As to matters within their authority, they may decide according to the equity of the case. *Edrington* v. *League*, 1 Tex. 64; *Cook* v. *Carpenter*, 34 Vt. 121.

Whether the submission so provides or not, the arbitrators are entitled to pay for their services for all the time spent by them in the matter, and may retain the award in their hands until paid (*Clement* v. *Comstock*, 2 Mich. 359); and an express promise is not essential. *Hinman* v. *Hapgood*, 1 Denio, 188; *Hassinger* v. *Diver*, 2 Miles (Penn.), 411; *Goodall* v. *Cooley*, 29 N. H. 48. Whether express power is given or not, it is held in many of the States that the arbitrators have an implied authority to determine and award what costs, including their own fees, shall be paid, and who shall pay them. *Burnell* v. *Everson*, 50 Vt. 449; *Hewitt* v. *Furman*, 16 S. & R. (Penn.) 135; *Chase* v. *Strain*, 15 N. H. 535; *Dudley* v. *Thomas*, 23 Cal. 365; *Nichols* v. *Ins. Co.*, 22 Wend. 125; *Dickerson* v. *Tyner*, 4 Blackf. 253; *McClure* v. *Shroyer*, 13 Mo. 104. But in others it is held that no such power can be implied, and that if the submission is silent upon that point, they have no power to award costs. *Hanson* v. *Webber*, 40 Me. 194; *Clement* v. *Comstock*, 2 Mich. 359; *Maynard* v. *Frederick*, 7 Cush. 247; *Dundon* v. *Starin*, 19 Wis. 261. And see *Morrison* v. *Buchanan*, 32 Vt. 289.

§ 9. **Of umpires.** An umpire can only be selected by the arbitrators when the submission so provides, and if arbitrators call in a third person to decide between them, when no such power is conferred by the submission, the award will be void (*Daniel* v. *Daniel*, 6 Dana [Ky.], 98; *Sharp* v. *Lipsey*, 2 Bail. [S. C.] 113); but when such power is conferred, the arbitrators may appoint the umpire at the outset, before they enter upon the consideration of the subjects submitted. But he can only act

in case there is a disagreement. *Woodrow* v. *O'Conner*, 28 Vt. 776, *Dudley* v. *Thomas*, 23 Cal. 365; *Bigelow* v. *Maynard*, 4 Cush. 317; *Rigden* v. *Martin*, 6 H. & J. (Md.) 403; *Dudley* v. *Thomas*, 23 Cal. 365; *Peck* v. *Wakely*, 2 McCord (S. C.), 279; *Newton* v. *West*, 3 Metc. (Ky.) 24. It is said in *Harding* v. *Watts*, 15 East, 556, to be "very convenient for arbitrators to begin by appointing an umpire, because they are more likely to agree upon a proper choice of one before they themselves begin to quarrel." And see *Leonard* v. *Cox*, 64 Mo. 32. The appointment should be made in writing; when the submission is in writing, although the question as to whether a parol appointment can be made when the submission is silent on that point, does not seem to be definitely settled (*Sharp* v. *Lipsey*, 2 Bailey [S. C.], 113); at all events, it is too late to interpose an objection upon that ground after the award is made (*Knowlton* v. *Homer*, 30 Me. 552); and, in the absence of proof to the contrary, the award is evidence of the appointment. *Elmendorf* v. *Harris*, 23 Wend. 628.

An umpire must give the parties an opportunity to be heard (*Taber* v. *Jenny*, Sprague, 315); and should examine the witnesses and documents for himself, in the presence of the parties (*Walker* v. *Walker*, 28 Ga. 140; *Falconer* v. *Montgomery*, 4 Dall. 232); and if he makes an award without giving the parties an opportunity to be heard, it will be invalid (*Small* v. *Courtney*, 1 Brev. [S. C.] 205; *Daniel* v. *Daniel*, 6 Dana [Ky.], 93; *Frissell* v. *Fickes*, 27 Mo. 557); particularly is this the case if he is requested by either party to hear the proofs. *Graham* v. *Graham*, 9 Penn. St. 254. But the parties may waive this right, and leave the umpire to decide according to the evidence given before the arbitrators (*Crabtree* v. *Green*, 8 Ga. 8; *Graham* v. *Graham*, 12 Penn. St. 128); and if the parties permit him to proceed without requesting a hearing, they are treated as having waived their rights in this regard. *Sharp* v. *Lipsey*, 2 Bailey (S. C.) 113; *Graham* v. *Graham*, 12 Penn. St. 128; *Kile* v. *Chapin*, 9 Ind. 150. He may make an award alone (*Shields* v. *Renno*, 1 Overt. [Tenn.] 313); and may make it before the time named for the arbitrators to make it (*Richards* v. *Brockenbrough*, 1 Rand. [Va.] 449); and, even though the award does not show that he was chosen and acted as umpire, yet that fact may be proved by evidence *dehors* the award (*Rison* v. *Berry*, 4 Rand. [Va.] 275); and his award is conclusive. *Butler* v. *Mayor, etc.*, 1 Hill (N. Y.), 489. His award is not invalidated, even though all the other arbitrators sign it, as their signatures may be treated as surplusage. *Frissell* v. *Ficks*, 27 Mo. 557; *Rison* v. *Berry*, 4 Rand. (Va.) 275; *Tyler* v. *Webb*, 10 B. Monr. (Ky.), 123; *Kile* v. *Chapin*, 9 Ind. 150; *Rigden* v. *Martin*, 6 H. & J. (Md.) 403; *King* v. *Cook*, T. M. P. Charlt. (Ga.) 286. His award, properly

made, is final (*Betterton* v. *Adams*, 13 La. Ann. 334); and he should pass upon the whole matter, and not confine his investigation merely to the points of difference between the arbitrators (*Haven* v. *Winnisimmet Co.*, 11 Allen, 377; *Bassett* v. *Cunningham*, 9 Gratt. 684); and his decision is final and conclusive, although in some matters he differs from all the arbitrators. *Bassett* v. *Cunningham*, 9 Gratt. (Va.) 684.

§ 10. **Of the award generally.** An award must follow the submission, and any excess of authority exercised by the arbitrators invalidates it (*Adams* v. *Adams*, 8 N. H. 82; *Lee* v. *Onstott*, 1 Pike [Ark.], 206; *Gibson* v. *Powell*, 5 Sm. & M. 712; *Stevens* v. *Gray*, 2 Harr. [Del.] 347); as, in such cases, the parties can only be bound in reference to those matters as to which they have consented to be bound. But the court will presume that they have acted within the limits of their authority, and if either party claims the contrary, the burden is upon him to show the excess; and, although the words of the award are so comprehensive as to take in matters not within the submission, the presumption applies until it is clearly shown that matters in excess thereof are embraced in it. *Solomons* v. *McKinstry*, 13 Johns. 27. When the award is contradictory, so that one part is irreconcilable with another, the first part will prevail, and the latter be rejected. *Cox* v. *Jagger*, 2 Cow. 638. If an award provides that each party shall do an act, and one of the acts is not within the submission, the award will be so far void, and if the acts are dependent the entire award will be void. *Brown* v. *Warnock*, 5 Dana (Ky.), 492.

The award must pursue the submission in form, as well as in substance, as, where the submission provides that the award shall be in writing and under seal, and shall be published by a certain day, a failure in either of these respects is fatal. As, if in such a case the award be by parol; or if it be in writing, but not under seal; or if it is made at a later day than that fixed upon, it cannot be enforced, because it does not follow the submission in form. *Henderson* v. *Williamson*, 1 Strange, 116; *Sallows* v. *Girling*, Cro. Jac. 277; *Stanton* v. *Henry*, 11 Johns. 133. A mere misrecital does not invalidate it, if it is really made in accordance with the submission (*Dole* v. *Dawson*, 2 Keb. 878; S. C., 1 Vent. 184; *Adams* v. *Adams*, 2 Mod. 169); as, if an umpire states in his award that the parties had bound themselves to abide by his award, when in fact they had only bound themselves to stand by the award of the arbitrators, it will be good, because in legal effect, and by fair intendment, it is correct. Id. If the submission simply relates to particular matters, an award that the parties shall execute general releases is bad, because it requires them to execute releases that cover matters not submitted. *Hill* v. *Thorn*, 2 Mod. 309; *Lee* v. *Elkins*, 12 id. 585;

*Williams* v. *Richardson*, 8 Taunt. 697. Thus, where the submission is of *all actions*, an award that covers *causes* of action, about which no action is pending, is bad, but such an award would be good if the submission was of all actions and controversies. 3 Viner's Abr. 49. So, if the submission is of all actions between the parties, and the award provides that they shall make releases of all actions to the time of the award, the award is bad, because the submission only authorized the arbitrators to act in reference to actions pending *at the time of submission*. *Vanlore* v. *Tripp*, 3 Vin. Abr. 48. A submission to arbitrators of an action pending between the parties to the submission, and of "all other actions and causes of action," and of "all other matters in controversy," is a general submission of all questions and controversies between the parties. *Jones* v. *Welwood*, 71 N. Y. (26 Sick.) 208. In cases of doubt, the presumption is in favor of an intention that all matters should be decided. Id. If an award directs a payment to a stranger, such part of the award may be void and the other part remain good, because the parties are not prejudiced if this part of the award is not performed. *Pope* v. *Brett*, 2 Saund. 293. So, where an award directed a lease for life to one of the parties, with remainder to a stranger in fee, it was held good, because the parties were not prejudiced by the award (*Bretton* v. *Pratt*, Cro. Eliz. 758); and it has been held that an award void in part and good in part, may be upheld as to that which is good, unless the objectionable part is so dependent upon that which is unobjectionable as to be inseparable therefrom. *Doke* v. *James*, 4 N. Y. (4 Comst.) 568; *Reynolds* v. *Reynolds*, 15 Ala. 398; *Rixford* v. *Nye*, 20 Vt. 132; *Banks* v. *Adams*, 23 Me. 259; *Parmalee* v. *Allen*, 32 Conn. 115; *Chase* v. *Strain*, 15 N. H. 535; *Rogers* v. *Tatum*, 25 N. J. Law, 281; *Walker* v. *Walker*, 28 Ga. 140; *Caton* v. *MacTavish*, 10 Gill & J. (Md.) 192; *Wynn* v. *Bellas*, 34 Penn. St. 160; *Gibson* v. *Powell*, 5 Sm. & M. 712; *Barrows* v. *Capen*, 11 Cush. 37; *Galloway* v. *Webb*, Hard. (Ky.) 326; *Carson* v. *Earlywine*, 14 Ind. 256; *Gibson* v. *Broadfoot*, 3 Desaus. (S. C.) 11. Thus, an unauthorized award of costs will only be void as to that matter, and will stand as to all others (*Day* v. *Hooper*, 51 Me. 178; *Blossom* v. *Van Amringe*, 63 N. C. 65; *Hubbell* v. *Bissell*, 2 Allen, 196; *Garitee* v. *Carter*, 16 Md. 309); but in order that the good part of an award may stand, it must appear to be in no way affected by the portion which is bad (*Wise* v. *Geiger*, 1 Cr. [C. C.] 92); and so independent thereof that justice can be done to the parties by rejecting the bad, otherwise the whole award must fall. *Philbrick* v. *Preble*, 18 Me. 255. Thus, if a gross sum is awarded, and it appears that the award was founded in part upon matters not submitted, the whole award is void. But where the award states the sums in items, so

that the authorized is distinguished from the unauthorized, the unauthorized will be rejected, and the award will stand as to the rest. *Chase* v. *Strain*, 16 N. H. 535. Where an award is good in part and void in part, the good part cannot be enforced if either party can object to the performance on his part on account of the want of a remedy to enforce the other, the part which is void. *Gibson* v. *Powell*, 5 Sm. & M. 712, 722.

If the arbitrators award that either party shall do an unlawful act, the award is void as to that part of it. *Aubert* v. *Maze*, 2 B. & P. 371. So, if an award orders one of two things to be done, and either of the two are uncertain or impossible, the award will be good and the party bound to perform the other of them (*Simmonds* v. *Swaine*, 1 Taunt. 549; *Oldfield's Case*, 1 Leon, 304); and the same rule prevails when the award is in part impossible. Rolle's Abr., tit. *Arbitration*, (N.) pl. 6. The general rule is, that where the matters awarded are distinct, so that the good can be separated from the bad, and the two are in no wise dependent upon each other, the award may be good as to one and void as to the other. *Lee* v. *Elkins*, 12 Mod. 585; *Simmonds* v. *Swaine*, 1 Taunt. 549, 555; *Darling* v. *Darling*, 16 Wis. 644; *Harrington* v. *Brown*, 9 Allen, 579; *Rixford* v. *Nye*, 20 Vt. 132; *Jackson* v. *Ambler*, 14 Johns. 96; *Hoagland* v. *Veghte*, 23 N. J. Law, 92; *Cowan* v. *McNeeley*, 10 Ired. 5. But, where several things are awarded, and the award is entire, and not in its nature divisible, it is void *in toto*. *Bonner* v. *Charlton*, 5 East, 139; *Cook* v. *Carpenter*, 34 Vt. 121; *Adams* v. *Adams*, 8 N. H. 82; *Sweet* v. *Matthewson*, 1 R. I. 420; *Morris* v. *Morris*, 9 Gratt. (Va.) 637; *Hubbell* v. *Bissell*, 13 Gray, 298; *Cullifer* v. *Gilliam*, 9 Ired. 126; *Hazen* v. *Addis*, 14 N. J. Law, 333; *Black* v. *Hickey*, 48 Me. 545; *Gibson* v. *Powell*, 5 Sm. & M. 712; *Buckley* v. *Ellmaker*, 13 S. & R. (Pa.) 71.

In order to constitute a valid award, there are at least ten things that are indispensably necessary; 1st, matter of difference; 2d, a submission; 3d, parties to the submission; 4th, arbitrators; 5th, giving up or delivery of the award; 6th, that it be made according to the submission; 7th, that it finally determines the controversy; 8th, that it shall be at least in appearance beneficial to the parties; 9th, that its performance is possible and lawful; 10th, and that there be a remedy by which either party can enforce his rights under the award. 2 West's Symboleog. 167 *b*. There are many other requisites that will be treated of distinctively, but these are the main ones, and are indispensable.

When the submission is by parol or in writing and is silent as to how the award shall be made, it may be made by parol (*Valentine* v. *Valentine*, 2 Barb. Ch. 430; *Phillbrick* v. *Preble*, 18 Me. 255;

*Goodell* v. *Raymond*, 27 Vt. 241); but a parol award is not operative to pass the title of real estate. *Phillbrick* v. *Preble*, 18 Me. 255.

An award must be of things possible for the parties to perform, and reasonable. If it provides that one of the parties shall give a note to the other and procure a certain person to become surety thereon, it is bad, because the party has no means by law to compel such person to become surety, so an award that one party shall give a note *with sureties* is void as to the sureties; but an award that one party shall pay another a certain sum is good, whether he has the means of paying it or not. But an award that the parties, or either of them, shall do an act that it is unreasonable to require them to do, or that they have not the power to do, is bad, as an award that requires one of the parties to convey to the other property that he does not own, or to deliver up to the other property which is in the custody of another, and which the party has no legal means of taking out of such person's custody. *Lee* v. *Elkins*, 12 Mod. 585. An action will not lie upon an award founded on the composition of a felony. *Levy* v. *Ross*, T. U. P. Charlt. (Ga.) 291. When a submission is made by one in a representative capacity, as executor or guardian, the award cannot be made to bind him personally. *Tallman* v. *Tallman*, 5 Cush. 325.

An award may be made to cover all matters that come within the terms of the submission according to a fair interpretation of the language used. Thus, a submission of all debts and demands will uphold an award that the parties shall release all judgments, executions and extents. *Roberts* v. *Mariett*, 2 Saund. 188, 190. A submission of certain suits and controversies particularly stated, "and of divers other matters," is equivalent to a general submission, and will uphold an award covering all controversies between the parties. *Monroe* v. *Allaire*, 2 Caines (N. Y.), 320, 326. So, a submission of "all injuries" will sustain an award covering all debts, duties, trespasses, etc., because whatever is against law is an injury. So, where the submission is "of all matters of difference in a certain cause," the arbitrators are not confined to the pleadings in the cause, but may take into consideration any cross demands or collateral issues, or matters of defense, whether pleaded or not, and their award will be good. *Green* v. *Woring*, 1 W. Bl. 475; *Woglam* v. *Burnes*, 1 Binn. (Penn.) 109; *Malcolm* v. *Fullarton*, 2 T. R. 645. So, a submission of all matters in variance authorizes an award for the partition of lands, and to direct how the partition shall be made, if the partition, at the time when the submission was made, was a matter of variance. *Gratz* v. *Gratz*, 4 Rawle (Penn.), 411. A submission reciting that "whereas a controversy is now existing concerning the settlement of book accounts, and all other deal and disputes between them," and sub-

mitting "all controversies, which we cannot settle ourselves, if any there be," does not include matters not in controversy, and not laid before the arbitrators, and their award is not a bar to suits brought to recover for such matters. *Robinson* v. *Morse*, 29 Vt. 404. When matters relating to a will are submitted, the award is binding upon the parties to the submission, even though it is in some respects inconsistent with the provisions of the will. Thus, a dispute relating to the division of lands under a will was submitted in general terms, and the arbitrators awarded that one of the parties was entitled to a certain number of acres, to be divided from the rest by a special line, and the other to the residue of the tract, it was held that the award was binding, although the line established by it was different from the dividing line named in the will. *Hollingsworth* v. *Lupton*, 4 Munf. (Va.) 114.

Where a submission is full and general of all matters in question between the parties, and the intent appears to have every thing decided, if any thing is, a decision of all matters submitted will be imperatively required to validate the award, and an award determining a part only, is void. *Jones* v. *Welwood*, 71 N. Y. (26 Sick.) 208.

An award must be published to both parties, if the submission so requires, or to all who submit, if there be more than two (*Huntgate* v. *Mease*, Cro. Eliz. 885); and, as it is complete before delivery (*Brown* v. *Vawser*, 4 East, 584; *Rowsby* v. *Manning*, 3 Mod. 331); it need not be delivered to the parties unless the submission so requires. *Rowsby* v. *Manning*, id. But where, by the submission, it is required to be delivered within a certain time, it must be delivered within that time, or it will be inoperative, and it seems that an extension of the time cannot be made or proved by parol. *Flatter* v. *McDermott*, 15 Ind. 389; *Goldsborough* v. *Mc Williams*, 2 Cr. (C. C.) 401. The delivery of a copy of an award is a publication thereof (*Low* v. *Nolte*, 16 Ill. 475); and the delivery of such copies upon Sunday is valid. *Kiger* v. *Coats*, 18 Ind. 153; *Blood* v. *Bates*, 31 Vt. 147. Where the defendant refused to pay, according to agreement, for the reason that the decision as to the amount he was to pay was an award made on Sunday, it was held that the announcement on Sunday of a decision made and finally communicated to the defendant on a week day, could not vitiate the contract. *Crosby* v. *Blanchard*, 50 id. 696. In a common-law arbitration, if there is no time or place named in the submission for the publication of the award, the arbitrators must notify the parties when and where they will publish the same (*Francis* v. *Ames*, 14 Ind. 251); but, unless the submission requires it, it is not necessary that it should be published or notice thereof be given to the parties, nor that it should be in writing. *Denman* v. *Bayless*, 22 Ill. 300. In the case of a statutory arbitration

where the award is to become a rule of the court, even though the submission requires that notice of the filing of the award shall be given, a failure in that respect is no ground of exception, but must be taken advantage of by motion to set aside, or the objection is treated as waived (*Masterson* v. *Kidwell*, 2 Cr. [C. C.] 669); and an award of pending suits need not be returned into court unless so required by the statute, or by the terms of the submission. *Willingham* v. *Harrell*, 36 Ala. 583.

The rules in reference to statutory arbitrations and awards vary according as the statutes vary, and in a work of this character it would not be profitable to give the rules as adopted in the various States, as the reader would have no means of ascertaining their applicability in a given case, without knowing the provisions of the statute under which the awards and the decisions were made. Awards are as final and conclusive between the parties as the judgment of a court of law, as to all matters within the limits of the submission, and, when there is no charge of corruption, fraud or misconduct on the part of the arbitrators, and the award on its face is final and valid, extrinsic evidence is not admissible to invalidate it (*Head* v. *Muir*, 3 Rand. [Va.] 122; *Ebert* v. *Ebert*, 5 Md. 353; *Todd* v. *Barlow*, 2 Johns. Ch. 551; *Lewis* v. *Wildman*, 1 Day [Conn.], 153; *Dorsey* v. *Jeoffray*, 3 H. & M. [Md.] 121), and no agreement or understanding outside the award, that it was to be considered as open for further proof, can be set up to invalidate it *Wheatley* v. *Martin*, 6 Leigh [Va.], 62; *Todd* v. *Barlow*, 2 Johns. Ch. 551; *Bumpass* v. *Webb*, 4 Port. (Ala.) 65. It cannot be shown that the arbitrators were mistaken, or proceeded upon erroneous principles. Thus, where a question as to a water-power was submitted and they, after making numerous experiments, constructed a table on hydraulic principles by which the use of the water was to be calculated, it was held that evidence, to show that the table was constructed on erroneous principles, was not admissible. *Boston Water-Power Co.* v. *Gray*, 6 Metc. (Mass.) 131. Under a general submission, the arbitrators have the power and the right to decide both upon the law and the facts, and an error in either respect will not invalidate their award (*Mitchell* v. *DeSchamps*, 13 Rich. [S. C.] 9; *Jones* v. *Boston Mill Corporation*, 6 Pick. 148; *Conrad* v. *Johnson*, 20 Ind. 421; *Crabtree* v. *Green*, 8 Ga. 8; *Curley* v. *Dean*, 4 Conn. 259; *Smith* v. *Smith*, 4 Rand. [Va.] 95), and where a question of law alone is submitted, the award is binding, although the decision is contrary to law. Id. Nor can an award be impeached for an erroneous judgment of the arbitrators upon the facts. *Jolly* v. *Blanchard*, 1 Wash. (C. C.) 252; *Curley* v. *Dean*, 4 Conn. 259; *Cromwell* v. *Owings*, 6 H. & J. (Md.) 10. They are the judges of what evidence they will receive

and consider and, unless in the reception or rejection of evidence they are guilty of such partiality as evinces fraud or corruption, their award cannot be attacked upon that ground. *Viele* v. *Troy & Boston R. R. Co.*, 21 Barb. 381; *Pike* v. *Gage*, 29 N. H. 461.

If the arbitration is statutory, the same rule prevails unless the statute makes different provisions, and if the statute prescribes distinct grounds upon which the award may be reviewed, it cannot be interfered with upon any other grounds than those designated. *Remelee* v. *Hall*, 31 Vt. 582; *Pierce* v. *Perkins*, 2 Dev. Eq. 250; *Ewing* v. *Beauchamp*, 3 Bibb (Ky.), 41; *Muldrow* v. *Norris*, 2 Cal. 74; *Johnson* v. *Noble*, 13 N. H. 286; *Hayes* v. *Miller*, 12 Ind. 187; *Taylor* v. *Sayre*, 24 N. J. Law, 647; *Elrad* v. *Simmons*, 40 Ala. 274; *Dulin* v. *Caldwell*, 29 Ga. 362; *Northern Cent. R. R. Co.* v. *Canton Co.*, 24 Md. 492; *Leach* v. *Weeks*, 2 Abb. N. S. (N. Y.) 269. An award cannot be attacked upon a ground of which the party was fully aware before it was made (*Willingham* v. *Harrell*, 36 Ala. 583; *Hoogs* v. *Morse*, 31 Cal. 128); nor to parts of the award that do not affect the party objecting (*Nettleton* v. *Buckingham*, 1 Root [Conn.], 149); nor can a third person attack it (*Penniman* v. *Patchen*, 6 Vt. 325); nor can a party object to any irregularity that might have been available before the award was made and of which he was, or ought to have been, cognizant. *Christman* v. *Moran*, 9 Penn. St. 487; *Cromwell* v. *Owings*, 6 H. & J. (Md.) 10.

§ 11. **Award, by whom made.** Unless the submission provides that an award may be made by a majority of the arbitrators, all of them must join in the award, and if there are four arbitrators and only three join in the award, it is utterly void (*Smith* v. *Walden*, 26 Ga. 249; *Eames* v. *Eames*, 41 N. H. 177; *Patterson* v. *Leavitt*, 4 Conn. 50; *Russell* v. *Gray*, 6 S. & R. [Penn.] 145; *Hoffman* v. *Hoffman*, 26 N. J. Law, 175; *Payne* v. *Moore*, 2 Bibb [Ky.], 163; *Patton* v. *Collins*, Sneed [Ky.], 153; *Green* v. *Miller*, 6 Johns. 39; *Jeffersonville R. R. Co.* v. *Mounts*, 7 Ind. 669), and the same rule prevails under the statutes, unless a contrary provision is made. *Jeffersonville R. R. Co.* v. *Mounts*, 7 Ind. 669. But if the parties agree that an award may be made by a majority of the arbitrators, although the submission is silent upon that point, the award will be binding (*Thompson* v. *Blanchard*, 2 Iowa, 44), as when several arbitrators are appointed, and one refuses to act, if the parties go on before the others, their award will be operative. *Kile* v. *Chapin*, 9 Ind. 150. But in order to avoid an award made by a majority of arbitrators, upon the ground that the others dissented, it must be shown that they dissented when the award was published. Thus, where an award which was

made by two of three arbitrators recited that two of the arbitrators heard the proofs and made the award, it was held that parol proof was admissible to show that the other was present and heard the proofs when the matters were submitted, and that he did not in fact dissent from the award, but neglected to join in making it, under the mistaken supposition that his power had been revoked and that the award was valid. *Schultz* v. *Halsey*, 3 Sandf. 405. See, also, to the same effect, *Jackson* v. *Gager*, 5 Cow. 383.

When the parties agree that a majority of the arbitrators may make an award, an award made by a majority is valid, if all were present and heard the proofs (*Bachelder* v. *Wallace*, 1 Wash. T. 126; *Maynard* v. *Frederick*, 7 Cush. 247); and an award made by a majority in such a case is valid, although the other was not present at the making of the award, if he refused to act further. Thus, where three arbitrators were agreed upon, with the provision that the award of two should be binding, met together and heard the parties; and after several consultations failed to agree, and one of them said that he should not sit with them again, it was held that an award made by two at another meeting, of which the other had no notice, was valid. *Carpenter* v. *Wood*, 1 Metc. (Mass.) 409; *Kingston* v. *Kincaid*, 1 Wash. (C. C.) 448. But even though the submission provides that a majority may make an award, all the arbitrators must be notified of the time and place of hearing (*Brower* v. *Kingsley*, 1 Johns. Cas. 334; *Bulson* v. *Lohnes*, 29 N. Y. 291; *Dalling* v. *Machett*, Willes, 215); and must be present at the hearing, unless the parties waive all objections in that respect, or the award is void. *Maynard* v. *Frederick*, 7 Cush. 247; *Carpenter* v. *Wood*, 1 Metc. (Mass.) 409; *Kingston* v. *Kincaid*, 1 Wash. (C. C.) 448; *Sperry* v. *Ricker*, 4 Allen, 17; *Battey* v. *Button*, 13 Johns. 187; *Bulson* v. *Lohnes*, 29 N. Y. 291; *Franklin Mining Co.* v. *Pratt*, 101 Mass. 359; *Dunphy* v. *Ford*, 2 Mont. 300. An award made by a majority of arbitrators is not vitiated because it is signed by other persons not named as arbitrators. *Carter* v. *Sams*, 4 Dev. & B. 182; *Blanchard* v. *Murray*, 15 Vt. 548. In some of the States, in the case of statutory arbitrations, it is held that an award made by a majority is valid, but at common law, unless otherwise agreed, all must concur or the award is of no binding force. *Parnell* v. *Parnell*, 3 Strobh. (S. C.) 486; *Kile* v. *Chapin*, 9 Ind. 150; *Quimby* v. *Melvin*, 28 N. H. 250. As to when an umpire may make an award, see *ante*, p. 523, § 9. The arbitrators may employ the counsel of one of the parties to draw up their awards. *Underwood* v. *Bedford, etc., R. R. Co.*, 11 C. B. (N. S.) 442; *Moore* v. *Ewing*, 1 N. J. Law, 144.

§ 12. **At what time.** Under a common-law submission an award

cannot be made after the expiration of the time limited in the submission, unless the parties consent thereto. *White* v. *Puryear*, 10 Yerg. 441; *Hall* v. *Hall*, 3 Conn. 308; *Smith* v. *Spencer*, 1 McCord's Ch. 92; *White* v. *Kemble*, 3 N. J. Law, 349. But if it is made within the time, ready for delivery, it is a sufficient compliance, although it is not published within the time, unless the submission provides that it shall be made *and published* within the period named (*McClure* v. *Shroyer*, 13 Mo. 104; *Martin* v. *McCormick*, 34 N. J. Law, 23; *Willard* v. *Bickford*, 39 N. H. 536); and, although no time is named in the award within which the award shall be made, yet, if there is any thing from which such a limitation can be implied, it will be implied. Thus, where the submission did not expressly fix the time within which the award should be made, but provided that the party found to be indebted should pay the amount by a certain day, it was held to operate as an implied limitation on the arbitrators' power as to time, and that an award could not be made by them *after* such day, without the consent of the parties. *People* v. *Townsend*, 5 How. (N. Y.) 315. But *contra*, see *Armstrong* v. *Robinson*, 5 G. & J. 412. Where a submission provided that the award should be made and ready for delivery within ninety days, it was held that, if the award was made and ready to be delivered to the prevailing party within that time, upon payment of the fees, it was within the provisions of the submission (*Willard* v. *Bickford*, 39 N. H. 536); and if it was ready but not delivered until a day later, it is sufficient, if neither party demanded it before (*Owen* v. *Boerum*, 23 Barb. 187), and if the submission requires that it shall be made *and published* within a certain time, its delivery to one of the parties is a sufficient compliance. *Rixford* v. *Nye*, 20 Vt. 132. Where no time is specified within which an award shall be made, it may be made at any time before the submission is revoked, and being delivered to one of the parties, with the signature of only one arbitrator, it may thereafter be signed by the other, and being so signed, will become valid and operative. *Small* v. *Thurlow*, 37 Me. 504; *Saunders* v. *Heaton*, 12 Ind. 20; *Nichols* v. *Rensselaer Ins. Co.*, 22 Wend. 125. Where the submission or the bond requires that an award shall be made within a certain stated time, yet if it also contains a provision that in case either party by his action shall delay the arbitrators, they shall be at liberty to make up their award, taking such time therefor as they shall deem reasonable; if either party secures an adjournment, or otherwise delays the arbitrators, they may make up their award upon a day subsequent to that named, and it will be valid and operative. *Armstrong* v. *Robinson*, 5 Gill & J. (Md.) 412.

An award made upon the Sabbath may be valid. Thus, where parties submitted their difference to arbitration and the arbitrators

met on Saturday and heard the parties, and continued their hearing until after midnight and then remained together until they had made their award which they published to the parties who still remained together, it was held that it was valid. *Sargeant* v. *Butts*, 21 Vt. 99. An announcement, on Sunday, of a decision made and finally communicated to the defendant on a week day, will not vitiate his contract to pay such damages as the arbitrator should award. *Crosby* v. *Blanchard*, 50 Vt. 696. An award delivered at another day and place than that named in the submission is valid, if the parties consent to receive it (*Elborough* v. *Gates*, 3 Keb. 69); and it takes effect from the day of its delivery, and not from the day of its date. *Cable* v. *Rodgers*, 3 Bulst. 313. An award is considered as *published* within the meaning of the term as employed in submission, when the parties have notice that it is ready for delivery (*Musselbrook* v. *Dunkin*, 9 Bing. 605); and if it is made and ready to be delivered within the time named, and notice thereof is given to *one* of the parties only, it has been held a sufficient publication within the time, though not actually delivered. *Jones* v. *Corry*, 5 Bing. N. C. 187; *Brown* v. *Vawser*, 4 East, 584. It is enough if the parties have such notice of the award as will enable the parties to obtain knowledge of its contents (*Brooke* v. *Mitchell*, 6 M. & W. 473); under statutory submissions, the question as to whether an award is made in time must depend upon the provisions of the statute. If the statute provides that the parties may enlarge the time, or that the court may do it upon application, or that the arbitrators may do it for certain causes, the submission must yield to the statute, although a certain time is named therein within which the award shall be made, because the statute is deemed a part of the contract.

§ 13. **General form and requisites.** An award must conform to the submission in form, as well as in substance. *Henderson* v. *Williamson*, 1 Stra. 116. If the submission provides that it shall be made in writing, or in writing under seal, it must be so made or it will be invalid. *Thaire* v. *Thaire*, Palm. 109. But if no provision is made in that respect, in the submission, and the character of the submission is not such as to raise any implied provision in that respect, it may be made by parol and may be delivered *ore tenus*. *Oates* v. *Brommell*, 2 Vent. 242; *Marsh* v. *Packer*, 20 Vt. 198; *Jones* v. *Dewey*, 17 N. H. 596. Under a statutory submission the award must be made as the statute provides. *Tuscaloosa Bridge Co.* v. *Jemison*, 33 Ala. 476; *Valle* v. *Northern Mo. R. R. Co.*, 37 Mo. 445. Thus, if the statute or the submission requires that it shall be witnessed (*Estep* v. *Larsh*, 16 Ind. 82; *Newman* v. *Labeaume*, 9 Mo. 30); or that it shall be in

writing (*Darling* v. *Darling*, 16 Wis. 644; *Roguet* v. *Carmouche*, 5 La. Ann. 133; *Steelman* v. *Stewart*, 2 N. J. Law, 230); or that it shall be under seal, the statutory direction must be substantially complied with, unless waived by the parties. *Cheney* v. *Gates*, 12 Vt. 565; *Stanton* v. *Henry*, 11 Johns. 133. When the submission or the statute requires the award to be in writing, it can only be proved by written evidence (*Darling* v. *Darling*, 16 Wis. 644), and, indeed, in all respects, the provisions of the submission or of the statute as to the award must be substantially complied with, whether they relate to its form or substance (*Field* v. *Oliver*, 43 Mo. 200; *New Albany, etc., R. R. Co.* v. *McPheters*, 12 Ind. 472), and, in case of a submission under seal or in reference to contracts under seal, the parties cannot by parol waive compliance therewith. Thus, where, after a submission in writing and under seal, of matters in reference to a lease under seal, the parties informed the arbitrators that they need not make an award in writing and the arbitrators in pursuance of such waiver made an award by parol, and the court held that it was void, for the reason that, not being in writing, it did not discharge the covenants of the lease under seal not yet broken, and consequently would not operate as a bar to an action for their breach. *French* v. *New*, 28 N. Y. (1 Tiff.) 147; reversing S. C., 20 Barb. 481. An award must be complete when signed and delivered, as the powers of the arbitrators are then exhausted and they have no power to amend the award, even to correct an apparent clerical mistake. *Dudley* v. *Thomas*, 23 Cal. 365. So, the award must be complete, as they can make but one, and if they attempt to make several awards, upon distinct matters, they are all void. 3 Vin. Abr. 62. But, unless void because not co-extensive with the submission, it would seem that the first award would be good. Fitzherbert's Nat. Brev., Arbitrament, pl. 62. If the arbitrators make an award that is defective in some respects, and afterward make a new one like the first in all respects except that the defects are remedied, the second award is invalid, but the first one will stand. *Doke* v *James*, 4 N. Y. (4 Comst.) 568. But if awards are made by several instruments *and all delivered at the same time*, they are to be treated as *one* award. *Ott* v. *Schroeppel*, 5 N. Y. (1 Seld.) 482. When the award substantially conforms to the statute or submission, the fact that there is not a literal compliance will not invalidate it. Thus where the award was required to be in writing, subscribed by the arbitrators or any two of them, and attested by a subscribing witness, an award signed by the three, with a witness to only two of the signatures, is valid, for it is complete without the signature of the third, and that may be treated as superfluous. *Ott* v. *Schroeppel*, 4 Barb. 250.

So, where an umpire makes an award, it is not vitiated because an arbitrator, or even all the arbitrators, join with him in making it. *Mayor, etc.*, v. *Butler*, 1 Barb. 325; 1 Hill, 489. The award need not show on its face that the arbitrators have complied with all the legal requisites to make it a valid instrument, as, that they notified the parties of the time and place of meeting (Id.; *Upshaw* v. *Hargrove*, 6 Sm. & M. 286; *Rigden* v. *Martin*, 6 H. & J. 403); or, where it is made by a majority of the arbitrators, that they *all* met and heard the parties (*Ackley* v. *Finch*, 7 Cow. 290; *Rixford* v. *Nye*, 20 Vt. 132; *Short* v. *Pratt*, 6 Mass. 496; *Houghton* v. *Burroughs*, 18 N. H. 499); or that they acted within the scope of the submission (*Hoffman* v. *Hoffman*, 26 N. J. Law, 175); or that they were sworn. *Negley* v. *Stewart*, 10 S. & R. (Penn.) 207. It is highly proper that the award should show compliance with these requisites, but failing to do so, compliance may be shown by evidence *dehors* the award. *Mayor, etc.*, v. *Butler*, 1 Barb. 325; *Rigden* v. *Martin*, 6 H. & J. 403. But where, upon its face, the award shows that the requirements of the submission or of the statute have not been complied with, it is void, as, where the award is required to be made at a day certain, and it bears a subsequent date, without showing any extension of the time by the parties (*Bloomer* v. *Sherman*, 2 Edw. Ch. 452); or where the award is required to be in writing, and a part of it is embraced in writing and a part is by parol (*Tudor* v. *Covell*, 20 N. H. 171); or if it is required to be under seal, but is not (*Price* v. *Thomas*, 4 Md. 514; *Rea* v. *Gibbons*, 7 S. & R. [Penn.] 204; *Stanton* v. *Henry*, 11 Johns. 133); or to be acknowledged, and it is not (*Heath* v. *Tenney*, 3 Gray, 380), the award will be void, unless the parties have waived the informality, either expressly or impliedly. *Ellison* v. *Chapman*, 7 Blackf. 224. After an award is delivered, the arbitrators cannot alter it, even to correct a clerical mistake, even though the time limited by the submission has not expired (*Irvine* v. *Elnon*, 8 East, 54); and an alteration of the sum awarded, after notice of the making, although upon the same day and before delivery, is void. But if the alteration has not rendered the award illegal as it stood before the alteration, it will stand as it existed before the alteration was made. *Henfree* v. *Bromley*, 6 East, 309. In *Ward* v. *Dean*, 3 B. & Adol. 234; *Butler* v. *Boyles*, 10 Humph. 155; *Bayne* v. *Morris*, 1 Wall. 97; *Dudley* v. *Thomas*, 22 Cal. 365, the award found that the plaintiff had no cause of action, and that a verdict should be entered for the defendant, and then, by mistake, provided that the costs should be paid by the defendant, meaning the plaintiff, it was held that the arbitrator having executed his award, could not rectify the mistake, nor can the court permit it to be altered (*Oxenden* v. *Cropper*, 10 Ad. & El. 197); even to make it conform to the

terms of the submission (*Hall* v. *Alderson*, 2 Bing. 476); unless the parties, all of them, consent thereto (*Ex parte Cuerton*, 7 D. & R. 774; *Fenton* v. *Dines*, 4 Jur. 554); except where the statute provides therefor. *Bird* v. *Penrice*, 6 M. & W. 754; *Zachary* v. *Shepherd*, 2 T. R. 781; *Synge* v. *Jervoise*, 8 East, 466. Where the arbitrators alter their award after it is delivered, by appending other papers thereto, the original award will stand, and the matter added will be treated as surplusage. *Woodbury* v. *Northy*, 3 Me. 85; *Dudley* v. *Thomas*, 23 Cal. 365; *Aldrich* v. *Jessiman*, 8 N. H. 516; *Lansdale* v. *Kendall*, 4 Dana (Ky.), 613. Their power is exhausted when the award is made and published, and thereafter they have no more power to change it than mere strangers thereto. *Butler* v. *Boyles*, 10 Humph. 155; *Lansdale* v. *Kendall*, 4 Dana (Ky.), 613; *Talbot* v. *Hartley*, 1 Cr. (C. C.) 31; *Doke* v. *James*, 4 N. Y. (4 Comst.) 568. But the burden is upon the party raising the objection to the award to prove the alteration. *Prima facie* possession of an award is proof that it was originally made as it appears. *Brown* v. *Warnock*, 5 Dana (Ky.), 492; *Lansdale* v. *Kendall*, 4 id. 613. But the parties may *consent* that an alteration may be made, and an alteration made in pursuance thereof is valid. *Evelith* v. *Chase*, 17 Mass. 458. But it is held that, where their award is to be returned by them to the court, their powers are not terminated until it is so returned by them (*French* v. *Moseley*, 1 Litt. 248); but, otherwise, their powers cease when the award is made and signed and published, and after that they have no power to change, or to refuse to deliver it. *Thompson* v. *Mitchell*, 35 Me. 281.

§ 14. **Award must not exceed, and must be co-extensive with the submission.** The authority of arbitrators is derived entirely from the submission, consequently their award must not embrace any matters not submitted to them, and if it does, it will be void, at least for the excess. *Cook* v. *Carpenter*, 34 Vt. 121; *Reynolds* v. *Reynolds*, 15 Ala. 398; *Mays* v. *Myatt*, 59 Tenn. 309; *Lee* v. *Onstott*, 1 Ark. 206; *Gibson* v. *Powell*, 5 Sm. & M. 712; *Smith* v. *Kincaid*, 7 Humph. 28; *Fountain* v. *Harrington*, 3 Harr. (Del.) 22; *Solomons* v. *McKinstry*, 13 Johns. 27; *Huff* v. *Parker*, 4 Dall. 285; *Adams* v. *Adams*, 8 N. H. 82; *Bean* v. *Farnam*, 6 Pick. 269; *Sessions* v. *Barfield*, 2 Bay (S. C.), 94. An award that contains any allowance for matters not submitted is wholly void if it is not distinguishable from the residue, and unless it appears that the consideration of the unsubmitted matters was so disconnected from the residue as to have had no influence upon it. *Boynton* v. *Frye*, 33 Me. 216; *Adams* v. *Adams*, 8 N. H. 82; *Ebert* v. *Ebert*, 5 Md. 353. But the award will stand if the parties ratify it (*Bullitt* v. *Musgrave*, 3 Gill [Md.], 31); and if

one party accepts from the other party part performance of his part of such an award, he is estopped from afterward setting up its invalidity. *Culver* v. *Ashley*, 19 Pick. 300. An award in excess of the matter submitted does not annul the original contract which was the subject of the reference, further than the award pursues the submission, nor then, if it is void *in toto*, because the parties are left precisely the same as though no award had been made. *Walsh* v. *Gilmor*, 3 H. & J. (Md.) 383; *Bullitt* v. *Musgrave*, 3 Gill (Md.), 31.

The parties seeing fit to acquiesce in an award for matters not embraced in the submission, third persons cannot attack it upon that ground. *Penniman* v. *Patchin*, 6 Vt. 325. Unless the award upon its face shows that matters not submitted are embraced in it, it will be presumed that it only comprehends matters that were within the terms of the submission, and the burden is upon the party attacking it upon that ground to establish its excessive character. *Parsons* v. *Aldrich*, 6 N. H. 264; *Reynolds* v. *Reynolds*, 15 Ala. 398; *Blair* v. *Wallace*, 21 Cal. 317; *Clement* v. *Comstock*, 2 Mich. 359; *Hubbard* v. *Firman*, 29 Ill. 90. In New Hampshire it is held that an award covering matters in excess of the submission will not be set aside for that reason, if the amount of the excess is ascertained and released or discharged. *Richardson* v. *Huggins*, 23 N. H. 106. But this would depend entirely upon the fact, whether the excess could be readily ascertained and distinguished from the residue. *Sawyer* v. *Freeman*, 35 Me. 542. When the submission and the award are both by parol, the question is for the jury to determine what was submitted, and what was decided by the award. *Torrence* v. *Graham*, 1 Dev. & B. (N. C.) L. 284. Although a matter is not expressly submitted, yet, if by fair implication it comes within its terms, or if it is a natural or necessary incident of the matter submitted, it will be presumed that the parties intend to have it acted upon by the arbitrators, and an award covering it will be upheld. Thus, if a submission recites that certain disputes have arisen out of a sale and re-sale of land, and submits all and every matter of dispute arising from or growing out of the transaction; an award that provides that one party shall pay the other a certain sum of money and receive a conveyance of the land, will be upheld, although, upon the face of the submission, the power is not given to the arbitrator to direct such conveyance. The power is an incident of the matter submitted (*Blair* v. *Wallace*, 21 Cal. 317; *Den* v. *Taylor*, 3 N. J. Law [2 Penn.], 640; *Brown* v. *Bellows*, 4 Pick. 192); and in all such cases the award will be upheld. *Waugh* v. *Mitchell*, 1 Dev. & B. Eq. 510; *Nichols* v. *Rens. Ins. Co.*, 22 Wend. 125; *Chase* v. *Strain*, 15 N. H. 535. The award must be co-extensive with

the submission, and cover all the matters submitted (*Carnochan* v. *Christie*, 11 Wheat. 446; *Tudor* v. *Scovell*, 20 N. H. 171; *Buntain* v. *Curtis*, 27 Ill. 374); and if the arbitrators refuse to decide upon some of the matters submitted, their award will be void. *Smith* v. *Potter*, 27 Vt. 304; *Harker* v. *Hough*, 7 N.J. Law (2 Halst.), 428; *Muldrow* v. *Norris*, 12 Cal. 331. But, even though the award does not in terms, yet, if in effect it includes all the matters submitted, it is valid. *Smith* v. *Demarest*, 8 N. J. Law, 195; *Harden* v. *Harden*, 11 Gray, 435; *Pearce* v. *McIntyre*, 29 Mo. 493.

In order to invalidate an award upon the ground that it does not embrace all the matters submitted, it must appear that they were made known to the arbitrators, and that they declined or neglected to pass upon them. *McNear* v. *Bailey*, 18 Me. 251; *Varney* v. *Brewster*, 14 N. H. 49; *Baspolis Case*, 8 Coke, 97 *b*. *Prima facie* an award is good, although not co-extensive with the submission, because it is presumed that it embraces all that was called to the attention of the arbitrators, and if in fact other matters *were* called to their attention and not passed upon by them, the fact must be proved. *Ott* v. *Schroeppel*, 5 N. Y. (1 Seld.) 482; *McNear* v. *Bailey*, 18 Me. 251; *Kleine* v. *Catara*, 2 Gall. (C. C.) 61; *Horrel* v. *M'Alexander*, 3 Rand. (Va.) 94. But to a declaration upon an award, a plea, setting forth that the arbitrators had refused to hear or investigate a matter embraced in the submission, is good, and a bar to a recovery (*Harker* v. *Hough*, 7 N. J. Law [2 Halst.], 428), and even though the arbitrators heard the parties and investigated the matters, but accidentally omitted them from the award, they cannot correct the mistake, and the award is void. *Porter* v. *Scott*, 7 Cal. 312. And see *Waller* v. *Shannon*, 44 Conn. 480. Courts are more liberal in their construction of awards than formerly, and the nice distinctions formerly maintained are now disregarded, and an award may be good though made for less than was submitted, unless it is shown that the arbitrators were requested to pass upon certain matters, but omitted to do so (*Hawkins* v. *Calcough*, 1 Burr. 277; *Simmonds* v. *Swaine*, 1 Taunt. 549, 554; *Bradford* v. *Bryan*, Willes, 268), and this is always a good defense to an award. *Mitchell* v. *Staveley*, 16 East, 58; *Ingram* v. *Milnes*, 8 East, 445. A submission of all matters in difference between parties imports all matters which any individual may have *jointly* or *severally* against any other, for the submission is to be construed distributively. Thus an award that one obligor shall pay a certain sum to a co-obligor is good. *Winter* v. *White*, 1 Brod. & Bing. 350. An award in ejectment for the plaintiff is good, although neither damages nor costs are awarded, as it will be presumed that no claim was urged before the arbitrators therefor.

*Harvey* v. *Snow*, 1 Yeates (Penn.), 156. So, under a submission of two counter demands, an award that one of the parties recover of the other a fixed sum "and the same is in full of all matters referred," is good. *Harden* v. *Harden*, 11 Gray, 435. The arbitrators are only bound to pass upon such matters as are presented to them, and an award made upon such matters is good whether it embraces all that were submitted or not. *Muldrow* v. *Norris*, 12 Cal. 331.

§ 15. **Must be entire and possible.** In order to be operative as a valid award, it must be both entire and possible in its requirements of the parties, as an award that leaves the questions submitted open in any respect, fails to carry out the intention of the parties, and is consequently void (*Sutton* v. *Horn*, 7 S. & R. [Penn.] 228; *McCrary* v. *Harrison*, 36 Ala. 577; *Archer* v. *Williamson*, 2 H. & G. 62; *Akely* v. *Akely*, 16 Vt. 450); and the same rule applies to an award that requires a party to do that which it is impossible for him to do. *Lee* v. *Elkins*, 12 Mod. 585. Thus, an award that one of the parties shall procure another person to do an act that such person is under no legal obligation to do (*Anonymous*, 3 Leon, 62); as, to procure a certain person to become surety for the payment of the award, is void, because the party has no remedy at law or in equity by which he can compel such person to become surety for him (*Oldfield* v. *Wilmer*, 1 Leon, 140; *Thursby* v. *Helbot*, 3 Mod. 272); or an award that requires a party to convey or deliver to the other property to which he has no title, or to pay the award out of the funds of an estate which he has no right to use for his private purposes. *Adams* v. *Staley*, 2 Show, 61. By impossible, as used in this connection, is meant an act which the party cannot legally do, or the doing of which he has no legal remedy to enforce; therefore, an award that required him to do that which he is not, in law, authorized to do, as, to assign an apprentice (*Hern* v. *Dryden*, 11 Mod. 272); or commit a trespass, or establish a nuisance, or to do any illegal act, or one which he cannot compel the doing of, is impossible, and consequently absolutely void. *Adams* v. *Staley*, 2 Show, 61; *Horn* v. *Dryden*, 11 Mod. 272.

§ 16. **Must be mutual.** An award which gives a benefit to one party without any correlative advantage to the other, is void (*Colston* v. *Harris*, Cro. Eliz. 904; *Veale* v. *Warner*, 1 Saund. 326; *Belmont* v. *Tyson*, 3 Blatchf. [C. C.] 530); as, if it is only binding upon one of the parties (Id.), or when it cannot be enforced in those matters in favor of one of the parties. *Brazill* v. *Isham*, 12 N. Y. (2 Kern.) 9. It is said that, if an award is final, and puts an end to the controversies submitted, it is mutual. *Carper* v. *Hirst*, 1 Lutw. 539; *Blackledge* v. *Simpson*, 2 Hayw. 30. It is not necessary that the same acts, in the same unquali

fied manner, should be awarded on each side to render the award mutual, or that each should be equally benefited thereby; it is sufficient if it puts an end to a controversy and discharges both (*Munro* v. *Alaire*, 2 Caines, 320); and does not leave him who is to pay liable to a suit upon the original demand therefor. *Blackledge* v. *Simpson*, 2 Hayw. 30. Nor is it necessary that the award should give the same remedy to the parties. One may be directed to pay money, and the other to do a specific thing (*Kunckle* v. *Kunckle*, 1 Dall. 364); nor is it an objection that one is to perform before the other is to execute a release. *Munro* v. *Alaire*, 2 Caines (N. Y.), 320. An award ordering the payment of money carries mutuality in itself, as it must be held to carry satisfaction of the matter submitted. *Weed* v. *Ellis*, 3 Caines, 253; *Baspole's Case*, 8 Co. 97 *b*. In a word, nothing more is requisite to constitute mutuality in an award than that the thing awarded to be done should be a final discharge of all future claim by the party in whose favor the award is made against the other for the matter submitted. Therefore, an award that one party shall pay another a certain sum for a trespass is good (*Nichols* v. *Grunnion*, Hob. 49; *Ormelade* v. *Coke*, Cro. Jac. 354); although the other party is not required to do any act, because by the payment of the money the original demand, which is merged in the award, is fully discharged. *Reynolds* v. *Reynolds*, 15 Ala. 398. So, an award that one party shall pay the other a certain sum as costs in a suit commenced by him against the other without cause, and that all suits and differences shall cease (*Walmough* v. *Holgate*, 2 Vent. 221; *Squire* v. *Grevell*, 6 Mod. 34); or that one party shall pay the other a certain sum, and take his mare away, within a week. *Cooper* v. *Hirst*, 1 Lutw. 539. It is not essential that the award should state that the sum ordered to be paid, or an act to be done by one of the parties, shall be in satisfaction, or even that it should contain any equivalent terms; as such is the legal effect, and satisfaction will be presumed. But it would seem that the award should express for what cause the money is to be paid, or the act is to be done. *Nichols* v. *Grunnion*, Hob. 49. But if it recites that it is made "of and concerning the premises," or if it recites the matters submitted, it will be good. *Gray* v. *Gwennap*, 1 B. & Ald. 106. But an award that is binding upon but one party, except possibly in the case of infants and married women, when the other knew before the award was made, or ought to have known, that they could not be bound, is void; as, an award made upon a submission between a consignee and a master of a vessel, that is not binding upon the charterer in whose favor it is made. *Belmont* v. *Tyson*, 3 Blatchf. (C. C.) 530. So, where an officer of a municipal corporation, acting in excess of his powers, submits a claim against the city or town to arbitration, the award will not be binding

upon the other party, because not binding upon the city or town. *Furbish* v. *Hall*, 8 Me. 315.

§ 17. **Must be final.** An award must finally determine all the matters embraced in it, and this element is indispensable to its validity, and it must so determine them that they can never afterward become the subject of litigation between the parties. *Waite* v. *Barry*, 12 Wend. 377; *Dundon* v. *Starin*, 19 Wis. 261; *McKeen* v. *Oliphant*, 18 N. J. Law (3 Harr.), 442; *Young* v. *Shook*, 4 Rawle (Penn.), 299. Being in the nature of a judgment, it must ascertain and decide as to the matters submitted, so that no further controversy can arise thereon. The very object of the submission is to secure this result; and an award that fails in that respect is void. *Patton* v. *Baird*, 7 Ired. Eq. 255; *McCrary* v. *Harrison*, 36 Ala. 577; *Sample* v. *Hutchinson*, 4 Phila. (Penn.) 249. Thus, an award that one party shall pay the other a certain sum, less what has already been paid, without setting forth what has been paid, or furnishing means for determining it, is void for want of finality, because it leaves the question as to the sum to be deducted still open to litigation between the parties. *Waite* v. *Barry*, 12 Wend. 377. So where in the case of a claim by one part owner of a vessel against another part owner, for insurance collected by the latter, the award was, that "there is due to C., the amount collected on policy of insurance held by F. for his (C.'s) sixteenth part of barque S." was held void because it did not determine that F. had received any money, nor, if any, how much. *Colcord* v. *Fletcher*, 50 Me. 398. So, where an award directed that one of the parties should pay to the others a certain sum of money for stock held by him, it was held void for want of finality, because it did not direct a transfer of the stock. *Matter of Williams*, 4 Denio, 194. See, also, *Jones* v. *Welwood*, 9 Hun (N. Y.), 166. It must be final without reference to other persons, or to any future examinations except in relation to the payment of costs, which may be left to the proper officer (*Selby* v. *Russell*, 12 Mod. 139; *Nichols* v. *Grunnion*, Hob. 49); but it seems that an award which leaves nothing to be done to dispose of the whole matter in controversy but some ministerial acts, such as selecting property to replace that which is lost, or the calculation of interest for a specific period at a specified rate, or the adding up of accounts, or the measurement of a definite piece of land, etc., is final within the meaning of the rule (*Owen* v. *Boerum*, 23 Barb. 187); but if the arbitrators reserve to themselves, any future power (*Calvert* v. *Carter*, 6 Md. 135); *Kinge* v. *Fines*, 1 Sid. 59); or if they definitely settle all matters but one, and leave either party a right to sue on that (*Bradford* v. *Bryan*, Willes, 268); or which merely orders a stay of proceedings (*Tipping* v. *Smith*,

2 Stra. 1024); or a nonsuit, is bad. *Simon* v. *Gavil*, 1 Salk. 74. But it seems that while the award of a nonsuit is bad, that one that awards that each shall discontinue actions begun against each other (*Ingram* v. *Webb*, 1 Roll. 362); or shall dismiss the same (*Knight* v. *Burton*, 6 Mod. 231); or that all actions between them shall cease (*Onyons* v. *Cheese*, 1 Lutw. 533); or that they shall proceed no further in their actions, is final and valid, because it will be presumed that it was intended by such awards to put an end to the actions forever. *Gray* v. *Gray*, Cro. Jac. 525; *Onyons* v. *Cheese*, 1 Lutw. 533. But where mutual suits are pending between parties, an award upon *one* only is void for want of finality. *Morse* v. *Hale*, 27 Vt. 660; *Coupland* v. *Anderson*, 2 Call (Va.), 106. But an award, in an action submitted, that the defendant recover his costs, is final, because it will be presumed that it was intended as an award that there was no cause of action. *Buckland* v. *Conway*, 16 Mass. 396; *Blossom* v. *Van Amringe*, 63 N. C. 65; *Traquair* v. *Redinger*, 4 Yeates (Penn.), 282; *McDermot* v. *U. S. Ins. Co.*, 3 S. & R. (Penn.) 604. In order to render an award sufficiently final, it must dispose of all the matters in controversy, and that too in a definite and intelligible manner (*Akely*, v. *Akely*, 16 Vt. 450; *Calvert* v. *Carter*, 6 Md. 135); and it must not be upon a contingency that may never happen (*Williams* v. *Landon*, 14 S. & R. [Penn.] 338); but if the award is final, independent of the contingency, it will stand. *Waugh* v. *Mitchell*, 1 Dev. & B. Eq. 510.

§ 18. **Must be certain.** An award must be certain so that no reasonable doubt can arise upon the face of it, as to what the arbitrator means, or what duties or liabilities it imposes upon the parties. *Samon's Case*, 5 Co. 78 *a*; *Murray* v. *Bruner*, 6 S. & R. 276; *Jackson* v. *DeLong*, 9 Johns. 43; *Parker* v. *Eggleston*, 5 Blackf. 128. Therefore, an award that one party shall give the other a bond, without naming the sum for which it shall be given (*Samon's Case*, 5 Co. 78 *a*); or that one party shall deliver to the other "a certain bond bearing date Feb. 17, 1821," without stating who are the obligees of the bond (*Sheppard* v. *Stites*, 7 N. J. Law [2 Halst.], 90); or that one party shall give security to the other in a certain sum, without naming the kind of security (*Thinne* v. *Rigby*, Cro. Jac. 314); or that he shall give security, *if required* (*Barnett* v. *Gilson*, 3 S. & R. 340; *Jackson* v. *DeLong*, 9 Johns. 43), are void for uncertainty. So is an award that one party shall pay to another, so much as in equity and good conscience is due (*Watson* v. *Watson*, Styles, 28); or of a certain sum "after deducting an unsettled account of the plaintiff against the defendant," without naming the amount (*Zerger* v. *Sailor*, 6 Binn. [Penn.] 24); or so much as certain property is worth (*Titus* v. *Perkins*, Skin. 248;

or so much as may be due on a single bill, without stating the amount that has been paid or should be applied thereon (*Sicard* v. *Peterson*, 3 S. & R. [Penn.] 468); or that one shall give up a certain obligation to the other, without describing it (*Bedam* v. *Clerkson*, 1 Ld. Raym. 123); or deliver up "the books," without specifying what books (*Cookson* v. *Ogle*, 1 Lutw. 550; *Simmonds* v. *Swaine*, 1 Taunt. 549; *Thomas* v. *Molier*, 3 Ohio, 266); or that one of the parties shall deliver to the other "the books, papers and accounts, and a small chest of wearing apparel," without any further description (*Thomas* v. *Molier*, id.); or that "the land shall be divided according to plan D" (*Gratz* v. *Gratz* 4 Rawle [Penn.], 411); or that one party shall pay the other a certain sum "for rents *and other small things*," without specifying of what such small things consisted (*Rudston* v. *Yates*, Marsh. 141); or that the defendant "shall give an indorser as per agreement submitted to the arbitrators and acknowledged by the parties" (*Walsh* v. *Gilmor*, 3 Harr. & J. 383); or that there is due to one of the parties a certain sum, "less what is due to the other for drawing 620 stoves" (*Parker* v. *Eggleston*, 5 Blackf. 128); or that one party shall do a certain act, or pay for certain property, without stating how much shall be paid (*Schuyler* v. *Vanderveer*, 2 Cai. 235); or that one of the parties shall be paid by the other, "the money due for day's work as well as for task work," without naming the sum. *Pope* v. *Brett*, 2 Saund. 292. Without stopping to give other illustrations, it may be said that the award should be so definite and certain as to have nothing to be supplied by extrinsic testimony, as having the credit of a judgment, no other interpretation can be placed upon it, than such as is warranted by the language used. The justice of this rule, as well as the reason, is at once apparent. The parties have consented to be bound only by the judgment of the arbitrators, and if their judgment is expressed so loosely that resort must be had to extrinsic evidence to interpret it, the intention and judgment of the arbitrators is only guessed at, and the parties may thereby be compelled to submit to that which they have never agreed to submit to. *Martham* v. *Jemx*, Yelv. 98. But, if it is certain to a common intent, and is consistent with a fair and reasonable presumption arising from the language used, taken in connection with the subject-matter submitted, it will stand, otherwise it is void. Kyd on Awards, 243; Dyer, 242 *a*. Thus if A commits a nuisance to B, by erecting scaffolds on his own ground and the arbitrators award that the scaffolds shall be removed, without stating by whom, it will be presumed that they intended that A should remove them, because they are on his grounds, for, although any person may remove a nuisance, yet, the arbitrators, who are the judges of the equities as well as the

law of the case, must be understood to intend that the removal should be made by him who created the nuisance, and thus, by the aid of this presumption, the award is not void for uncertainty. *Arnote* v. *Breame*, 6 Mod. 244. So, generally, when an award is susceptible of being reduced to a certainty, by reference to matters not in dispute between the parties, it will be upheld; as, an award that one party shall "pay the taxable costs of the suit," without stating how much they are, is valid, because it may be ascertained by reference to the attorney's bill (*Beale* v. *Beale*, Cro. Car. 383), or to the clerk of the court, or the record. *Wright* v. *Smith*, 19 Vt. 110.

So, an award that the defendant "shall pay the amount of the note in controversy," because it may be readily ascertained by reference to the note. *Coxe* v. *Gent*, 1 McMull. (S. C.) 302. An award in the alternative is not void for uncertainty (*Harson* v. *Webber*, 40 Me. 194), for when the party has done either of the things named, the award is performed (*Lee* v. *Elkins*, 12 Mod. 585); as, that one party shall deliver up to the other certain property, or pay him a certain sum of money (*Harison* v. *Webber*, 40 Me. 194; *Lee* v. *Elkins*, 12 Mod. 385); and generally, when the intention of the arbitrators can be certainly arrived at, without *guessing* at their meaning, by reference to any thing referred to in the award, or to any book, paper or document as to a matter about which there is, or in law can be no dispute, the award will be upheld. *Macon* v. *Crump*, 1 Call (Va.), 575; *Coxe* v. *Gent*, 1 M'Mull. (S. C.) 302; *Carsley* v. *Lindsay*, 14 Cal. 390; *The Liverpool Packet*, 2 Sprague (C. C.), 37; *Bowman* v. *Downer*, 28 Vt. 532; *Benson* v. *White*, 101 Mass. 48; *Hays* v. *Miller*, 12 Ind. 187; *Willard* v. *Bickford*, 39 N. H. 536. When it is left to a subsequent event to ascertain precisely the thing awarded, it will be sufficient if that event must necessarily happen (*Collett* v. *Podwell*, 2 Keb. 670); or if the parties can readily ascertain, by following the directions given in the award. *Galloway* v. *Webb*, Hard. (Ky.) 326.

When an award furnishes a substantial basis, by and through which the parties can, by calculation or otherwise, work out the contemplated result, in accordance with the principles settled by, and the rights of the parties declared in the award, it will be regarded as sufficient. *Backus* v. *Fobes*, 20 N. Y. (6 Smith) 204; *Locke* v. *Filley*, 14 Hun (N. Y.), 139.

Although the rule was formerly otherwise, at the present day an award is not deemed to be void because it does not state the amount that is due at its date, if it contains all the elements necessary to ascertain such amount by a simple calculation, without departing at all from the scheme or principle of the award. All that is now required, either by the courts

of this country or England, is, that there should be certainty to a common intent. Indeed, it may be said that the rule, as at present existing, is, that if the award is sufficiently definite to be obligatory as a contract, it is sufficiently definite to be upheld as an award. *Bush* v. *Davis*, 34 Mich. 190; *Wohlenberg* v. *Lageman*, 6 Taunt. 251; *Cargey* v. *Aitcheson*, 2 B. & C. 170.

§ 19. **Presumption and intendment.** The courts will make all reasonable presumptions in favor of awards valid upon their face (*Kendrick* v. *Tarbell*, 26 Vt. 416; *Dolph* v. *Clemens*, 4 Wis. 181; *Tomlinson* v. *Hammond*, 8 Iowa, 40; *Merritt* v. *Merritt*, 11 Ill. 565); and they will be sustained, unless these presumptions are overcome by full proof (*Tomlinson* v. *Hammond*, 8 Iowa, 40; *Smith* v. *Minor*, 1 N. J. Law, 16; *Strong* v. *Strong*, 9 Cush. 560); as, that they acted fairly and impartially (*Claypool* v. *Miller*, 4 Blackf. 163; *McCalmont* v. *Whittaker*, 3 Rawle [Penn.], 84); and that they considered and decided upon all matters within the submission to which their attention was called by the parties (*Karthaus* v. *Ferrer*, 1 Pet. 222; *McNear* v. *Bailey*, 18 Me. 251; *McCullough* v. *McCullough*, 12 Ind. 487); and have not exceeded their powers (*Clement* v. *Comstock*, 2 Mich. 359; *Richardson* v. *Huggins*, 23 N. H. 106; *Blair* v. *Wallace*, 21 Cal. 317); and if any formal omission is shown, it will be presumed that the parties waived it (*Willingham* v. *Harrell*, 36 Ala. 583; *Henneigh* v. *Kramer*, 50 Penn. St. 530); and indeed all fair and reasonable intendments will be made to sustain their action, and nothing will be presumed or intended against it (*Merritt* v. *Merritt*, 11 Ill. 565; *Green* v. *Franklin*, 1 Tex. 497); and the burden is upon the party attacking it, upon any ground, to establish his objection. *Tomlinson* v. *Tomlinson*, 3 Iowa, 575; *Tabor* v. *Jenny*, 1 Sprague (C. C.), 315.

§ 20. **Construction.** Awards will be construed favorably, and so as to uphold them if possible, in accordance with the *intention* of the arbitrator, when no inconvenience will ensue therefrom. *Burns* v. *Hendrix*, 54 Ala. 78. Thus, if the award is indefinite or uncertain in any particular, but is susceptible of being rendered reasonably certain by the application of a legal rule, or by reference to matters referred to in the award, it will be upheld; as, if it directs that one of the parties shall do a certain act, but specifies no time within which he shall do it, it will be construed as giving the party a reasonable time, in view of the thing to be done, because it is presumed that they intended the doing of all that is necessary to the performance of the thing awarded (*Freeman* v. *Bernard*, 1 Salk. 69); and, generally, although an award upon its face may not be sufficiently certain to enable a court of equity to enforce its specific performance, yet, if certainty can be arrived at by reference to

something *dehors* the award, the party seeking to enforce it may, by an averment, cure the objection. *Grier* v. *Grier*, 1 Dall. 173; *Kingston* v. *Kincaid*, 1 Wash. (C. C.) 448; *Perkins* v. *Giles*, 53 Barb. 342; *Borrets* v. *Patterson*, 1 Tayl. 37. Where an action is submitted, and the arbitrators find for the plaintiff, their award will be construed as negativing the pleadings. Thus, where a suit was submitted and a plea of tender had been filed, but the arbitrators found for the plaintiff, the court held that this imported a finding against the tender. *Berkheimer* v. *Geise*, 82 Penn. St. 64. Without stopping to particularize, it may be stated as a general rule, universally applied, that courts will construe awards favorably, and make all reasonable presumptions and intendments in favor of their validity, and if any part of an award is good, while the residue is bad, if that which is good can be separated from that which is bad, and the one is in nowise dependent upon the other, it will uphold it as to that which is good, and reject that which is bad, thus giving effect to the action of the arbitrators as far as it is possible to do so, consistently with the agreement of the parties. *Johnson* v. *Wilson*, Willes, 253; *Barnardiston* v. *Fowler*, 10 Mod. 204; *Skillings* v. *Coolidge*, 14 Mass. 43; *Bogan* v. *Daughdrill*, 51 Ala. 312; *Fudickar* v. *Guardian Mut. Life Ins. Co.*, 62 N. Y. (17 Sick.) 392; *Locke* v. *Filley*, 14 Hun (N. Y.), 139. Awards are not to be taken strictly, but largely and favorably (*Bell* v. *Gipps*, 2 Ld. Raym. 1142); and, if necessary to carry out the intention of the arbitrators, the court will transpose or reject insensible words, and construe it according to the evident intention of the parties. *Butler* v. *Wigge*, 1 Saund. 61. So, if an award is contradictory, so that one part cannot stand with another, the court will give effect to the first part, and that portion of the award that is inconsistent therewith will be rejected. *Berry* v. *Perry*, 3 Bulst. 66. So, where an award is general, and the submission is special, if it is severable, it will be applied only to the special things comprised in the submission, and the others will be rejected as void. *Ingrave* v. *Web*, Palm. 108. An award is to be construed as relating only to matters between the parties (*Strangford* v. *Green*, 2 Mod. 228; *Stevens* v. *Matthews*, 1 Ld. Raym. 116); and if the submission relates to matters between the parties in a particular relation, as that of partners, co-tenants, etc., an award that "all suits shall cease" will be construed as relating only to suits between them growing out of such relation. *Squire* v. *Grevell*, 6 Mod. 34. An award will be construed as merging the original claims, when it creates a *new* duty; but if it only directs a release to discharge the old duty, the rule is otherwise. *Freeman* v. *Bernard*, 1 Salk. 69. If the payment of money is awarded, and no time is fixed within which it is to be paid, it is construed as an award to pay *instanter*.

*Squire* v. *Grevu*, Holt, 82. When an award is not dated, and a certain thing is directed to be done within a certain time, it is construed as an award that the thing shall be done within a certain time from the *delivery* of the award. *Armitt* v. *Breame*, 2 Ld. Raym. 1076.

§ 21. **Recommitting.** Under a common-law submission the courts have no power to recommit an award to the arbitrators for correction or reconsideration, or for *any* purpose, nor does such power exist under a statutory submission unless clearly given by the statute, or unless such power can be implied from the language of the statute. *Smith* v. *Smith*, 28 Ill. 56. When this power exists, the award may be recommitted upon the ground of newly-discovered evidence (*Depew* v. *Davis*, 2 Greene [Iowa], 260); or because of an informality (*Shaw* v. *Pearce*, 4 Binn. 485; *Cumberland* v. *N. Yarmouth*, 4 Me. 459); or indeed, in the discretion of the court, either for the correction of errors, or a new hearing. *Boardman* v. *England*, 6 Mass. 70; *Treasurer, etc.*, v. *Norton*, 1 Ohio, 270; *Heslop* v. *Bush*, 80 Penn. St. 70; *Johnston* v. *Paul*, 22 Minn. 17. But it is not practicable to pursue this matter further, as in a given case the practitioner must consult the statute, and the decisions of the courts of the State in which the question arises, to ascertain whether the power to recommit exists or not.

§ 22. **Good in part, bad in part.** The rule is now well settled that, where an award is good in part, and void in part, and the good is severable from the bad, and they are in nowise dependent the one upon the other, that the award may be upheld as to the good, and that the residue may be rejected. *Skillings* v. *Coolidge*, 14 Mass. 43; *Rogers* v. *Tatum*, 25 N. J. Law, 281; *Walker* v. *Walker*, 28 Ga. 140; *Parmalee* v. *Allen*, 32 Conn. 115; *Day* v. *Hooper*, 51 Me. 178. But the valid part cannot be enforced and the invalid part be rejected, if either party can object to the performance of his part, upon the ground of a want of remedy to enforce performance by the other (*Gibson* v. *Powell*, 13 Miss. 712); or, where the good and bad are so connected that they cannot be separated, or where it is evident that the good part is affected by the bad. *McCormick* v. *Gray*, 13 How. (U. S.) 26; *Philbrick* v. *Preble*, 18 Me. 255.

§ 23. **Fraud and mistake.** An award obtained by the fraud of the party (*Bulkley* v. *Starr*, 2 Day [Conn.], 552; *Emerson* v. *Udall*, 13 Vt. 477; *Spurck* v. *Crook*, 19 Ill. 415); or by reason of fraud, corruption, partiality, or gross misconduct, on the part of the arbitrators, will be set aside by a court of equity, where courts of law do not possess the power as being against equity and good conscience (*Baird* v. *Crutchfield*, 6 Humph. 171; *Rand* v. *Redington*, 13 N. H. 72; *Conway* v.

*Duncan*, 28 Ohio St. 102); unless the party applying therefor has done that which amounts to a waiver thereof. *Noyes* v. *Gould*, 57 N. H. 20. If there has been no waiver, the award may be set aside upon those grounds, even though the parties agreed in the submission that there should be no exception or appeal. *Speer* v. *Bidwell*, 44 Penn. St. 23. In order to impeach an award upon the ground of fraud, corruption or misconduct of an arbitrator, the proof must be clear and conclusive and not depend upon the naked assertions of the other party, or upon mere suspicions. *Atkinson* v. *Townley*, 1 N. J. Law, 388; *Hardeman* v. *Burge*, 10 Yerg. (Tenn.) 202; *Hamilton* v. *Wort*, 3 Blackf. 68; *Callant* v. *Downey*, 2 J. J. Marsh. 346. But it may be inferred, when the award is so manifestly unjust, as irresistibly to lead to that conclusion, as, where the amount awarded is nearly three times as much as was claimed. *South Carolina R. R. Co.* v. *Moore*, 28 Ga. 398; *Rand* v. *Redington*, 13 N. H. 72. But in order to warrant the court in setting aside an award upon the ground of fraud or corruption upon the part of the arbitrators, upon the ground of excessive damages, the amount awarded must be so grossly extravagant as to negative the idea that it expresses the honest judgment of the arbitrators. *Burchell* v. *Marsh*, 17 How. (U. S.) 344; *Rudd* v. *Jones*, 4 Dana (Ky.), 229; *Van Cortlandt* v. *Underhill*, 17 Johns. 405. If an arbitrator was intoxicated during the hearing, the award will be set aside without any other proof, as that is evidence of such misconduct as ought to vitiate his action upon the matters between the parties. *Smith* v. *Smith*, 28 Ill. 56. But where there is no evidence of partiality, an award will not be set aside, because one of the arbitrators is a creditor of one of the parties (*Fisher* v. *Towner*, 14 Conn. 26; *Wallis* v. *Carpenter*, 13 Allen, 19); or had previously expressed an opinion upon the matters in dispute (*Graves* v. *Fisher*, 5 Me. 69); nor when the party objecting to the award had notice of the facts, before the award was made. *Fox* v. *Hazleton*, 10 Pick. 275. And it is no ground for setting aside an award of an arbitrator, that he had formerly been counsel in another action for the party in whose favor he found, although this fact was not known or communicated to the party against whom the award was made, or to his counsel, in the absence of evidence that the fact was intentionally concealed. *Goodrich* v. *Hulbert*, 123 Mass. 190. A common-law award cannot be set aside for mistake either of the law or facts, unless the error is so palpable as to show that injustice has been done as they are the judges of both. But under statutory submissions, it is held that an award may be set aside for mistakes as to the facts, when such mistake clearly appears upon the face of the award (*Conger* v. *James*, 2 Swan [Tenn.], 213. See, also, *Halstead* v. *Seaman*, 52

How. (N. Y.) 415; *Fudickar* v. *Guardian Mut. Life Ins. Co.*, 62 N. Y. [17 Sick.] 392); and the arbitrators were evidently misled or deceived thereby. *Roloson* v. *Corson*, 8 Md. 208.

The instances are rare, in which an award will be set aside for mistake of facts. *Boston Water-Power Co.* v. *Gray*, 6 Metc. (Mass.) 131; *Learned* v. *Bellows*, 8 Vt. 79; *M'Calmont* v. *Whitaker*, 3 Rawle, 84; *Ross* v. *Overton*, 3 Call (Va.), 309. An award will only be set aside upon the ground of a mistake as to the law, when the submission requires that they shall decide according to law, or it is evident from their award that they intended so to decide, but acted under a clear mistake as to what the law was. *Crissman* v. *Crissman*, 5 Ired. L. 498; *Muldrow* v. *Norris*, 2 Cal. 74; *Johnson* v. *Noble*, 13 N. H. 286; *Johns* v. *Stevens*, 3 Vt. 308.

§ 24. **Effect of an award.** An award, at common law, operates as a merger of the original claims upon which it is predicated whenever a new duty is created thereby. But, if it only directs a release to discharge the old duty, the old duty is not merged therein. *Freeman* v. *Barnard*, 1 Salk. 69. It may be pleaded in bar of an action to recover upon the original demand, although not performed, because the plaintiff's remedy only exists upon the award. *Squire* v. *Grevett*, 2 Ld. Raym. 965; *Boisloe* v. *Baily*, 6 Mod. 221; *Crofts* v. *Harris*, 12 id. 4; *Hunter* v. *Rice*, 15 East, 100. But this is not the rule when the award is not reciprocal as where it directs that one party shall accept, without awarding performance by the other (*Clapcott* v. *Davy*, 1 Ld. Raym. 612; *Allen* v. *Milner*, 2 C. & J. 47), nor where the amount only of a debt is submitted, and the award only ascertains the amount and directs that it shall be paid in money. Id. An award of mutual releases does not discharge an action until it is performed. *Freeman* v. *Bernard*, 1 Ld. Raym. 248), nor, when a defendant is in custody under a *capias*, is he entitled to be discharged under an award until he has actually performed its conditions, unless the award otherwise directs. *Johnson* v. *Wilson*, Willes, 248. An award is conclusive as to all matters covered by it (*Greene* v. *Darling*, 5 Mas. [C. C.] 201; *Gernon* v. *Cochran*, Bee. Adm. [U. S.] 209; *Richardson* v. *Lanning*, 26 N. J. Law, 130), *as between the parties thereto* (*Wyatt* v. *Benson*, 23 Barb. 327; *Chapman* v. *Champion*, 2 Day [Conn.], 101), as to every point decided by the arbitrators (*Shackleford* v. *Purkett*, 2 A. K. Marsh. 438), and, if a suit in reference to any of the matters is pending between the parties, and there is no provision that the award shall be entered as a rule of court, it operates as a discontinuance thereof. *Jordan* v. *Hyatt*, 3 Barb. 275. But, if a suit is defeated by an award in an action thereon against the defendant, he cannot set up the inva-

lidity of the submission in defense. *Stipp* v. *Washington Hall Co.*, 5 Blackf. 473.

An award upon a general submission does not bar an action upon a demand not presented before the arbitrators (*Edwards* v. *Stevens*, 1 Allen, 315); nor one not passed upon by them (*Pritchard* v. *Daly*, 73 Ill. 523); and parol evidence is admissible to prove that the demand was not submitted, or that it was withdrawn, or not passed upon, and if the fact is established, an action on such demand will lie. *Webster* v. *Lee*, 5 Mass. 334; *Newnan* v. *Wood*, Mart. & Y. (Tenn.) 190; *Birkbeck* v. *Burrows*, 2 Hall (N. Y.), 51. But, where the matter is passed upon by the arbitrators and a valid award is made, it is a bar to any action thereon. *Brazill* v. *Isham*, 12 N. Y. (2 Kern.) 9; *Rodgers* v. *Holden*, 13 Ill. 293.

§ 24. **Action at law on award.** An action at law will lie upon a valid award, made under a valid submission to recover a specific sum named therein (*Bayne* v. *Morris*, 1 Wall. 97; *Scearce* v. *Scearce*, 7 Ind. 286); and when the award merges the original claim, that is, when it creates a new obligation in place of the old one, the party *must* pursue his remedy on the award, and cannot resort to his original cause of action, for the award is a good bar to such action. *Merritt* v. *Merritt*, 11 Ill. 565. But it is otherwise where the submission is invalid; as, if it was founded on a composition of a felony (*Levy* v. *Ross*, T. U. P. Charlt. 291); or if it was of a matter over which the parties had no control. *Watertown* v. *Waterbury*, 1 Root (Conn.), 212; *Sawyer* v. *Winnegance Mill Co.*, 26 Me. 122. A submission under a statute may be enforced by action upon the award, unless it is made under a rule of court (*Low* v. *Nolte*, 16 Ill. 475; *Dickerson* v. *Tyner*, 4 Blackf. 253); and it is the only remedy, unless the statute provides a different mode. *Day* v. *Hooper*, 51 Me. 178. A recovery cannot be had upon an award further than so far as it is conformable to the submission. *Walsh* v. *Gilmor*, 3 Harr. & J. (Md.) 391; *Robinson* v. *Moore*, 17 N. H. 479. Assumpsit lies upon a parol award, and is the only proper remedy (*Piersons* v. *Hobbes*, 33 N. H. 27); and the law implies a promise to pay, and no express promise need be alleged. *Swicard* v. *Wilson*, 2 Mills' (S. C.) Const. Ct. 218. But assumpsit will not lie upon an award under seal. The action should be debt. *Tullis* v. *Sewell*, 3 Ohio, 513. When the award provides for the payment of money unconditionally, the party becomes liable to pay it *instanter*, unless a precise time is named, and no demand therefor need be alleged or proved. *Thompson* v. *Mitchell*, 35 Me. 281; *Parsons* v. *Aldrich*, 6 N. H. 264; *Nichols* v. *Rensselaer Ins. Co.*, 22 Wend. 125; *Dudley* v. *Thomas*, 23 Cal. 365. But when the award is in the alternative, or when the award makes the payment de-

pendent upon performance by the plaintiff of a precedent act, he must aver performance, or an offer to perform, or his declaration will be demurrable (*Huy* v. *Brown*, 12 Wend. 591; *Jesre* v. *Cater*, 28 Ala. 475; *Comer* v. *Thompson*, 54 id. 265; *Leitch* v. *Beatty*, 23 Ill. 642; *Smith* v. *Stewart*, 5 Ind. 220); or, if money is only payable on request, a demand must be set forth. *Parsons* v. *Aldrich*, 6 N. H. 264. To an action upon a common-law award, misconduct on the part of the arbitrators cannot be shown in defense. *Hough* v. *Beard*, 8 Blackf. 158. But it may be shown that the arbitrators considered matters not submitted to them, or omitted to consider all the matters presented to them, under the submission (*Hall* v. *Vanier*, 6 Neb. 85; *Sharp* v. *Woodbury*, 18 Iowa, 195); or, in Massachusetts, that they were guilty of fraud, corruption, or committed a gross mistake. *Brown* v. *Bellows*, 4 Pick. 179. But at the common law, neither fraud, corruption, nor gross mistake on the part of the arbitrators is matter of defense. *Strong* v. *Strong*, 9 Cush. 560; *Inslee* v. *Flagg*, 26 N. J. Law, 368; *Elkins* v. *Page*, 45 N. H. 310; *Morewood* v. *Jewett*, 2 Robt. (N. Y.) 496. The remedy in such cases is to apply to a court of equity to set aside the award. See *Halstead* v. *Seaman*, 52 How. (N. Y.) 415. Arbitrators are proper witnesses to testify concerning what matters were presented before them, and whether or not they had considered all the matters referred. *Hall* v. *Vanier*, 6 Neb. 85.

§ 26. **Suit in equity.** The specific performance of a valid award for the conveyance of land, or the performance of any act ordered to be done under an award when there is no adequate remedy therefor at law, may be enforced in a court of equity upon suit brought by the party in whose favor the award is made (*Jones* v. *Boston Mill Corporation*, 6 Pick. 148; *McNear* v. *Bailey*, 18 Me. 251; *Smith* v. *Smith*, 4 Rand. [Va.] 95; *Ballance* v. *Underhill*, 4 Ill. [3 Scam.] 453; *Pawling* v. *Jackman*, 6 Litt. [Ky.] 1); and no ratification or confirmation of the award need be shown to induce a court of equity to enforce performance. *Akely* v. *Akely*, 16 Vt. 450. All that need be shown is, that there is a valid award, that there is no adequate redress at law, and performance by or readiness on the part of the plaintiff to perform his part of the award. *Pawling* v. *Jackman*, 6 Litt. (Ky.) 1; *Memphis, etc., R. R. Co.* v. *Scruggs*, 50 Miss. 285. But if the award is uncertain or defective (*Cox* v. *Smyth*, Hard, 420); or for the payment of money only (*Cannady* v. *Roberts*, 6 Ired. Eq. 422); it will not be specifically enforced. Nor will a court of equity decree a specific performance of an agreement to submit, nor to name arbitrators to settle a matter of dispute (*Copper* v. *Wells*, 1 N. J. Eq. 10); nor will it decree a specific performance of an award when it is shown that the award was obtained

through the fraud, corruption or partiality of the arbitrators, or that they made a mistake in making up the award; as the enforcement of such an award would be inequitable, and the party, by seeking to enforce its performance specifically, elects to treat it as a contract, and leaves it open to all the defenses that might be interposed in defense to an action for the specific performance of a contract (*Ballance* v. *Underhill*, 4 Ill. [3 Scam.] 453; *McCawley* v. *Brown*, 12 B. Monr. 132); and the same rule prevails where it is shown that the award is for any cause invalid. *Caldwell* v. *Dickinson*, 13 Gray, 365. A court of equity will set aside an award for fraud, or corruption on the part of the arbitrators, or where the award is so grossly wrong as to evince fraud or corruption on their part (*Tracy* v. *Herrick*, 25 N. H. 381; *Snyder* v. *Rouse*, 1 Metc. [Ky.] 625; *Halstead* v. *Seaman*, 52 How. [N. Y.] 415); and a court of law may set aside an award upon the same ground where the submission was made under a rule of court in a pending suit under a statute (*Baltimore, etc., R. R. Co.* v. *Polly*, 14 Gratt. 447; *Tracy* v. *Herrick*, 25 N. H. 381); but not otherwise. *Baltimore, etc., R. R. Co.* v. *Polly*, 14 Gratt. 447. But equity will not interfere to set aside an award upon the ground that the arbitrators have evinced an erroneous judgment as to questions either of law or fact, if they acted honestly and fairly in the matter. *Morris* v. *Ross*, 2 Hen. & M. 408; *Bell* v. *Price*, 21 N. J. Law, 32; *Herrick* v. *Blair*, 1 Johns. Ch. 101; *Neal* v. *Shields*, 2 Pen. & W. 300.

If the arbitrators acted in good faith, neither party will be permitted to avoid it, by showing that they erred in their judgment either respecting the law or the facts of the case (*Riddle's Estate*, 19 Penn. St. 431; *Merritt* v. *Merritt*, 11 Ill. 565; *Moore* v. *Barnett*, 17 Ind. 349; *Fudickar* v. *Guardian Mut. Life Ins. Co.*, 62 N. Y. [17 Sick.] 392), unless the mistake is *very* gross (*Morris* v. *Ross*, 2 Hen. & M. 408), and a wrong has been done that partakes of the nature of willfulness or fraud or corruption. *Burroughs* v. *David*, 7 Iowa, 154. For a mere erroneous judgment upon the law or facts, their award cannot be impeached. *Curley* v. *Dean*, 4 Conn. 259; *Cromwell* v. *Owings*, 6 Harr. & J. 10; *Locke* v. *Filley*, 14 Hun (N. Y.), 139. When the statute makes specific provision as to the manner in which awards made in pursuance of it shall be reviewed by the courts, the method so provided is the only one open to the parties, nor can they be interfered with upon any other grounds. *Taylor* v. *Sayre*, 24 N. J. Law, 647; *Northern Cent. R. R. Co.* v. *Canton Co.*, 24 Md. 500; *Dulin* v. *Caldwell*, 29 Ga. 362; *Elrod* v. *Simmons*, 40 Ala. 274. Where by the terms of the submission, or by the provisions of the statute, arbitrators are to decide the matters submitted to them according to law, a court of equity will set

aside an award made by them contrary to the law. *Torrance* v. *Amsden*, 3 McLean (C. C.), 509. So it will set aside an award for the misbehavior of an arbitrator, although it does not evince corruption, if it nevertheless operates unjustly to one of the parties. *Lee* v. *Patillo*, 4 Leigh (Va.), 436; *Rand* v. *Redington*, 13 N. H. 72. So an award will be set aside, when it appears that either it or the submission was obtained by the fraud of one of the parties (*Bulkley* v. *Starr*, 2 Day [Conn.], 552; *Emerson* v. *Udall*, 13 Vt. 477; *Spurck* v. *Crook*, 19 Ill. 415); and it is assailable upon any of these grounds even though the parties stipulated not to take exceptions to, or an appeal therefrom (*Speer* v. *Bidwell*, 44 Penn. St. 23); or assented to the statements before the arbitrators, if they were in fact false. *Bulkley* v. *Starr*, 2 Day (Conn.), 552. Partiality, interest, or relationship on the part of an arbitrator is no ground for setting aside an award, if the party had knowledge of the facts before the award was made, or in season to revoke the submission. By going on after he knew the facts, he is estopped from setting them up to defeat the award, even though he is evidently injured thereby. *Fox* v. *Hazleton*, 10 Pick. 275. In courts of law, under a statutory arbitration of a pending suit, the remedy of a party seeking to set aside an award for any cause is by motion supported by affidavits establishing the grounds upon which the award is sought to be set aside. *Stevens* v. *Pearson*, 5 Vt. 503; *Cromwell* v. *Owings*, 6 Harr. & J. 10; *Wiley* v. *Platter*, 17 Ill. 538.

The testimony of an arbitrator is admissible to sustain, but not to impeach his award (*Stone* v. *Atwood*, 28 Ill. 30; *Bigelow* v. *Maynard*, 4 Cush. 317; *French* v. *New*, 20 Barb. 481); except to prove what facts or demands were submitted to them, and what matters are embraced in their award (*Hale* v. *Huse*, 10 Gray, 99; *Williams* v. *Wood*, 1 Dev. L. 82; *Stevens* v. *Gray*, 2 Harr. [Del.] 347); or as to the time and circumstances under which the award was made, and as to any facts which transpired at the hearing (*Woodbury* v. *Northy*, 3 Me. 85; *Spurck* v. *Crook*, 19 Ill. 415; *Strong* v. *Strong*, 9 Cush. 560); or to show that they exceeded their powers. *Briggs* v. *Smith*, 20 Barb. 409. But they will not be permitted to testify as to their own misconduct, or that of a party, if it involves their own (*Ellmaker* v. *Buckley*, 16 S. & R. [Penn.] 72); nor to establish fraud or corruption on the part of their associates in making the award. *French* v. *New*, 20 Barb. 481; *Bigelow* v. *Maynard*, 4 Cush. 317. But *contra*, see *King* v. *Jemison*, 33 Ala. 499; *Graham* v. *Graham*, 9 Penn. St. 254.

§ 27. **Action upon arbitration bond.** A bond given by the parties, or an agreement to submit to arbitration, may be the subject of an action where the damages stipulated or the penalty will authorize a recovery.

But such an agreement or bond does not prevent the parties from pursuing their remedy in the courts. *Percival* v. *Herbemont*, 1 M'Mull. (S. C.) 59. In an action upon the bond it is only necessary to show that the defendant revoked the submission, or if an award was made, that he has neglected or refused to perform its provisions (*Cole* v. *Chapman*, 3 Ill. [2 Scam.] 34; *Tyler* v. *Dyer*, 13 Me. 41); and the conditions of the bond are broken as much if the defendant hinders or prevents the arbitrators from making an award, as by a refusal to perform the condition thereof when made. *Quimby* v. *Melvin*, 28 N. H. 250. But if the bond is conditioned that the award shall be made within a particular time, it must appear that it was made within the time stipulated, or no recovery can be had thereon (*Freeman* v. *Adams*, 9 Johns. 115, *Peters* v. *Johnson*, 3 Harr. & J. 291); unless the time was extended by an indorsement upon the bond, that extends it, as well as the time for making the award, and a mere indorsement thereon, signed by the party against whom the award is made, is not sufficient to enable the other party to recover for the non-performance of an award made after the day mentioned in the bond itself. *Freeman* v. *Adams*, 9 Johns. 115; *Peters* v. *Johnson*, 3 Harr. & J. 291. But such an indorsement upon the bond is sufficient, if the bond is again delivered to the obligee by the obligor. *Bryer* v. *Stewart*, 2 Hayw. (N. C.) 111; *Shermer* v. *Beale*, 1 Wash. (Va.) 11. But if there are sureties upon the bond, they must also indorse consent thereon, or it is inoperative. *Brookins* v. *Shumway*, 18 Wis. 98.

The measure of recovery in an action upon an arbitration bond is not the amount fixed as the penalty, but only so much as is due in equity and good conscience. *Blaisdell* v. *Blaisdell*, 14 N. H. 78; *Miller* v. *Hays*, 26 Ind. 380. Thus, in an action where it appeared that the defendant revoked the authority of the arbitrators after they had had one sitting, and also that, by reason of the submission, two actions pending in court in favor of the plaintiff against the defendant at the time, and embraced in the submission, had been dismissed, it was held that the plaintiff was entitled to recover a judgment embracing the costs of the arbitration incurred prior to the revocation, and also the costs of the two suits that had been dismissed. *Blaisdell* v. *Blaisdell*, 14 N. H. 78. But fees paid to an attorney for prosecuting a suit to recover the award, or for defending suits brought by the defendant against the plaintiff upon demands embraced in the award, cannot be recovered in an action upon the bond. *Miller* v. *Hays*, 26 Ind. 380.

# CHAPTER X.

## BILL OR NOTE TAKEN FOR A DEBT.

### ARTICLE I.

#### OF THIS DEFENSE IN GENERAL.

**Section 1. In general.** The subject of bills and notes is treated at large in Vol. 1 of this work; and this chapter is limited in its scope to the inquiry, in what cases and how far the fact that such an instrument has been taken for a debt is available as a defense.

A debt is a good consideration for a bill or note, and equally so whether such debt was pre-existing, or arose upon a present advance or value given. Hence, a defense to an action on such an instrument cannot be based solely upon the fact that it was taken for a debt. *Townsley* v. *Sumrall*, 2 Pet. 170; *Swift* v. *Tyson*, 16 id. 1; *Blanchard* v. *Stevens*, 3 Cush. 162. In that respect, it makes no difference whether the bill or note, given or transferred to the creditor, was that of the original debtor, or that of a third person. But the agreement between the debtor and creditor, the circumstance attending the transaction, or the subsequent acts or neglects of the creditor, may enable the debtor, or the person liable on the instrument, to set up its being taken for a debt as a defense, either alone, or in connection with other defenses thereby rendered available.

In the absence of any agreement or circumstances modifying its effect, the acceptance of a negotiable instrument for a debt merely suspends the creditor's right to sue on the original claim until such instrument is due. *Smith* v. *Applegate*, 1 Daly, 91. If that is not paid at maturity, the original debt, or rather the remedy upon it, revives, and a suit may be maintained thereon; but until then it furnishes a defense, and a plea setting it up should show that the instrument so taken is not yet due.

The acceptance of a non-negotiable note is held not to operate to suspend the remedy on the original debt, unless there is some new consideration. *Geller* v. *Seixas*, 4 Abb. Pr. 103.

This defense is available in an action brought by either the original creditor, the payee of the note or a subsequent holder thereof;

and either the original debtor, or his surety, or the maker or indorser of the bill or note, can, under certain circumstances peculiar to each class of defendants, take advantage thereof.

§ 2. **When a defense.** As between the creditor and the original debtor, or those jointly liable with him, the defense that a note or bill has been taken for the debt is substantially that of payment, or perhaps, more strictly, that of accord and satisfaction. *Ligon* v. *Dunn*, 6 Ired. 133; *Sard* v. *Rhodes*, 1 M. & W. 153; *Sibree* v. *Tripp*, 15 id. 22; *Sheehy* v. *Mandeville*, 6 Cranch, 253; *Hart* v. *Boller*, 15 S. & R. 162; *Booth* v. *Smith*, 3 Wend. 66. It is important then to inquire when the acceptance of such an instrument operates as a payment, or an accord and satisfaction of the debt; because then it furnishes a complete bar to an action on such debt.

There are numerous cases holding that, if a vendor of goods, at the time of the sale, receives therefor from the purchaser the bill or note of a third person, he will be presumed to have received it in payment, and that presumption will prevail unless expressly disproved; but that the receipt of the debtor's own bill or note raises no such presumption. *Gibson* v. *Tobey*, 46 N. Y. 637; 7 Am. Rep. 397; *Whitbeck* v. *Van Ness*, 11 Johns. 408; *Breed* v. *Cook*, 15 id. 241; *Youngs* v. *Stahelin*, 34 N. Y. 258; *Randlet* v. *Herren*, 20 N. H. 102. This view is controverted in 2 Am. Leading Cases, 185–187, and the position that the rights of the parties must depend upon the understanding on which they acted, and the question of their intention should therefore be submitted to the determination of the jury, is sustained by several authorities. *Hickling* v. *Hardey*, 7 Taunt. 313; *Brown* v. *Keewly*, 2 Bos. & Pul. 318; *Wright* v. *First Crockery Ware Co.*, 1 N. H. 281; *Jones* v. *Savage*, 6 Wend. 658; *Poole* v. *Rice*, 9 W. Va. 73. The indorsement or guaranty of the purchaser seems to be sufficient to rebut the presumption, if any exists. *Monroe* v. *Hoff*, 5 Den. 369; *Johnson* v. *Weed*, 9 Johns. 310.

But the question of intention is at rest, and the defense complete, when the creditor expressly accepts such an instrument, whether made by the debtor or a third party, as payment and satisfaction of his demand, because the original debt is thereby absolutely extinguished. *St. John* v. *Purdy*, 1 Sandf. 9; *Conkling* v. *King*, 10 N. Y. 440; *N. Y. State Bank* v. *Fletcher*, 5 Wend. 85; *Sheehy* v. *Mandeville*, 6 Cranch, 253; *Abercrombie* v. *Mosely*, 9 Port. 145; *Slocumb* v. *Holmes*, 1 How. (Miss.) 139; *Comstock* v. *Smith*, 23 Me. 202; *Newall* v. *Hussey*, 18 id. 249; *Pope* v. *Tunstall*, 2 Ark. 209; *Watson* v. *Owens*, 1 Rich. 111; *Jewett* v. *Pleak*, 43 Ind. 368. And this is so, even though the note received is for a less sum than the original debt. *Draper* v.

*Hitt*, 43 Vt. 439; 5 Am. Rep. 292; *Ellsworth* v. *Fogg*, 35 Vt. 355; *Noel* v. *Murray*, 13 N. Y. 167. In the latter case, if such note is taken on condition that it be paid at maturity, and it is not then paid, the whole debt will not be extinguished; but if the creditor retains the note and receives the amount of it after its maturity, he cannot afterward sue for any balance. *Conkling* v. *King*, 10 Barb. 372.

Although received as payment, a note is not payment if void for usury or other cause; or if its acceptance was induced by the fraudulent misrepresentations of the debtor. *Webster* v. *Stadden*, 14 Wis. 277; *Roberts* v. *Fisher*, 43 N. Y. 159; *Hoopes* v. *Strasburger*, 37 Md. 390; 11 Am. Rep. 538.

If a creditor, being directed by his debtor to apply to a third party for the amount of his debt, accepts from such third party his time check, and sends his debtor a receipt, that amounts to a payment of the debt, though the drawer of the check may have failed before it became due. *White* v. *Howard*, 1 Sandf. 81. So, also, if he takes a draft from his debtor, and receives from the drawee his time notes (*Southwick* v. *Sax*, 9 Wend. 122); or takes the note of a third person as security, and receives from such person his new note in part payment (*Nexsen* v. *Lyell*, 5 Hill, 466); or if the creditor of a firm, after its dissolution, receives from one partner his individual note, the note of a third party, and the balance of the amount of the firm debt in cash. *Waydell* v. *Luer*, 3 Den. 410.

If a creditor receiving a bill, note or check for an account is guilty of laches which discharge the drawer or indorser, he thereby makes it his own, and extinguishes the debt for which it was transferred. *Smith* v. *Miller*, 43 N. Y. 171. If, at the time a creditor received a note from his debtor for a pre-existing debt, the maker was solvent and so continued to be long enough for the creditor to have realized his debt by suit, and in the meantime rights have accrued to other parties, the court will intend that it was given in satisfaction of the original debt, and throw the loss, if any, upon the negligent creditor. *Lear* v. *Friedlander*, 45 Miss. 559.

An accommodation maker or indorser of a bill, note or check, which has been fraudulently misapplied as payment or security for a precedent debt, contrary to the understanding between himself and the person for whose accommodation he made or indorsed it, and without any new credit being given, or any security being relinquished or discharged, or any new responsibility incurred by the holder, can set up those facts, in connection with and as rendering it subject to any defenses which he may have against precedent parties in an action thereon

by such holder. *Coddington* v. *Bay*, 20 Johns. 637; *Stalker* v. *McDonald*, 6 Hill, 93.

If a debtor transfers to his creditor the note of a third party as collateral security, without the relinquishment by the latter of any right of action on the original debt, or any new consideration, it remains subject to all equities between the makers and prior holders, and in an action thereon they may set up the fact that it was so transferred, and any defense which they may have to it. But giving time has, in many cases, been held sufficient as a new consideration. *Wardell* v. *Howell*, 9 Wend. 170; *Petrie* v. *Clark*, 11 S. & R. 377; *Jenkins* v. *Schaub*, 14 Wis. 1; *Bertrand* v. *Barkman*, 13 Ark. 150; *Jenness* v. *Bean*, 10 N. H. 266; *Cullum* v. *Branch Bk.*, 4 Ala. 21; *Roxborough* v. *Messick*, 6 Ohio St. 448; *Goodman* v. *Simonds*, 19 Mo. 106; *Prentice* v. *Zane*, 2 Gratt. 262; *Sargeant* v. *Sargeant*, 18 Vt. 371.

A surety in a note, bond or other instrument is entitled to the exercise of diligence on the part of the creditor in the use and application of all securities placed in his hands by the principal debtor; and if the creditor voluntarily relinquishes any security so obtained, or by a valid agreement gives time to such debtor without the surety's consent, he thereby discharges such surety. The giving of a valid note or check is a sufficient consideration to sustain an agreement to give time. *Myers* v. *Welles*, 5 Hill, 463; *Walters* v. *Swallow*, 6 Whart. 446. And if the creditor receives the notes of a third party, payable at a time later than that on which the surety is liable, as collateral security, or as conditional payment of the same debt, that has the same effect in respect to giving time to the debtor as an express agreement to do so, and if done without the surety's consent, it is to his injury and discharges him. *King* v. *Baldwin*, 2 Johns. Ch. 554; 17 Johns. 384; 2 Am. Lead. Cas. 364, 372; *Beale* v. *Bank*, 5 Watts, 529; *Clark* v. *Hill*, cited 9 Vt. 147; *Skip* v. *Huey*, 1 Atk. 91; *Rees* v. *Berrington*, 2 Ves. Jr. 540; *U. S.* v. *Howell*, 4 Wash. 620; 2 Am. Lead. Cas. 419; *Chickasaw Co.* v. *Pitcher*, 36 Iowa, 594.

The same principle applies to the case of an indorser, who, in respect to the drawer or maker of a bill or note, stands in the relation of surety; and the giving of time by the creditor to his principal, without his consent, by accepting a check on a bank made by other parties and payable at a future day, will exonerate him and furnish him a good defense to an action on the instrument. *Okie* v. *Spencer*, 2 Whart. 253; *Dorlon* v. *Christie*, 39 Barb. 610.

The extent to which this defense will avail depends upon the relation between the parties. A debtor who sets up the defense that he gave the creditor notes or bills of third parties as collateral security,

can sustain it only so far as he shows that he has suffered injury from the failure of the creditor to pursue the usual course of business in respect to them; but where the creditor received them as conditional payment, the fact that he did so is a *prima facie* bar to the action; and the creditor must show that the usual course of business has been pursued, or that no mischief has resulted from the failure to pursue it. *Kearslake* v. *Morgan*, 5 Term, 513; *Price* v. *Price*, 16 M. & W. 232; *Conkling* v. *King*, 10 N. Y. 440; *Dayton* v. *Trull*, 23 Wend. 345. The same principle applies as between co-sureties. *Goodloe* v. *Clay*, 6 B. Monr. 236. In respect to indorsers and sureties, as we have seen, they may be completely discharged by the laches of the creditor.

§ 3. **When not a defense.** Unless the creditor's receiving a bill or note for a debt in some way operates to extinguish that debt, or the liability of the party setting up that defense, it furnishes no defense. It is a general rule that a debt is not extinguished by the creditor's accepting an obligation of equal dignity. *Bowers* v. *State*, 7 Harr. & J. 32; *Hart* v. *Boller*, 15 S. & R. 162. But the mere taking of a note, bill or check for a debt does not, in general, operate to discharge or extinguish the demand for which it was taken, whether of equal dignity or not; nor confine the creditor to an action upon such instrument, unless such was the agreement of the parties. *Tobey* v. *Barber*, 5 Johns. 68; 2 Am. Leading Cases, 245, and cases cited; id. 264; *Aultman* v. *Jett*, 42 Wis. 488; *Paine* v. *Voorhees*, 26 id. 522; *Bates* v. *Rosekrans*, 37 N. Y. 409; *Crane* v. *McDonald*, 45 Barb. 354; *Marshall* v. *Marshall*, 42 Ala. 149; *Doebling* v. *Loss*, 45 Mo. 150; *Middlesex* v. *Thomas*, 20 N. J. Eq. 39; *Stevens* v. *Anderson*, 30 Ind. 391; *Guion* v. *Doherty*, 43 Miss. 538; *Dunlap* v. *Shanklin*, 10 W. Va. 662. And the rule is the same, whether the debt was pre-existing or contemporaneous with the receipt of such instrument. Ib.

Giving a note or bill for an antecedent debt is not a payment of it, unless received under an express agreement, or under circumstances from which an agreement may be fairly implied, to treat it as a payment; or unless payment in fact results (*May* v. *Gamble*, 14 Fla. 467; *Matteson* v. *Ellsworth*, 33 Wis. 488; 14 Am Rep. 766; *Archibald* v. *Argall*, 53 Ill. 307); or unless the creditor makes it his own by laches on his part. *Gallagher* v. *Roberts*, 2 Wash. (C. C.) 191; *Denniston* v. *Imbrie*, 3 id. 396; *Dougal* v. *Cowles*, 5 Day, 511. An express agreement to receive the note of a third person as payment is not binding if such agreement was procured by fraudulent concealments and misrepresentations. *Poole* v. *Rice*, 9 W. Va. 73. But if the representations were a mere expression of an opinion, though fraudulently made,

it will not prevent the note from operating as a payment. *Homer* v. *Perkins*, 124 Mass. 431.

The effect of the creditor's receiving such an instrument is simply to suspend the creditor's remedy on the original debt until the maturity of the instrument so received, and to require him then to produce such instrument, or show that it is not in a situation to be enforced against the debtor. 2 Am. Lead. Cases, 245, and cases cited; *Eastman* v. *Porter*, 14 Wis. 39; *Moses* v. *Trice*, 21 Gratt. 556; 8 Am. Rep. 609; *DeYampert* v. *Brown*, 28 Ark. 166. And if he was induced to take it by fraud, or if it is worthless, or void for forgery or usury, he need not wait for its maturity before suing on the original demand. *Miller* v. *Woods*, 21 Ohio, 485; 8 Am. Rep. 71; *Roberts* v. *Fisher*, 43 N. Y. 159; *Goodrich* v. *Tracy*, 43 Vt. 314; 5 Am. Rep. 281; *Ramsdell* v. *Soule*, 12 Pick. 126; *Johnson* v. *Johnson*, 11 Mass. 359.

The taking of a note payable on demand, or of a negotiable instrument for a prospective liability not yet matured, cannot even suspend the remedy on the original demand. *Fearn* v. *Cochran*, 4 C. B. 274; *Kinsley* v. *Buchanan*, 5 Watts, 118; *Bay* v. *Coddington*, 5 Johns. Ch. 54. Nor can the transfer and acceptance of non-negotiable securities have that effect, in the absence of special agreement. *Huse* v. *McDaniel*, 33 Iowa, 406. Such securities do not operate as payment unless paid. *Johnson* v. *Gilbert*, 4 Hill, 178; *Cardell* v. *McNeil*, 21 N. Y. (7 E. P. Smith) 336.

The acceptance of a check or draft for a debt merely suspends temporarily the remedy on such debt, and does not, without special agreement, operate as payment until it is itself paid. *Tanner* v. *Bank of Fox Lake*, 23 How. Pr. 399; *Genin* v. *Tompkins*, 12 Barb. 265; *Lovett* v. *Cornwell*, 6 Wend. 369; *Heartt* v. *Rhodes*, 66 Ill. 351; *Kermeyer* v. *Newby*, 14 Kan. 164; *Puckford* v. *Maxwell*, 6 Term, 52.

Nor does the fact that a negotiable instrument was received by the holder for a pre-existing debt furnish any reason for the admission of equities between precedent parties as a defense against him, if he took it in good faith, before maturity and without notice of equities, and surrendered his previous security; because in such a case he will be a *bona fide* holder, and protected against equities. *Knox* v. *Clifford*, 38 Wis. 651; 20 Am. Rep. 28; *Heath* v. *Silverthorn*, 39 id. 146; *Bank of St. Albans* v. *Gilliland*, 23 Wend. 311; *Armour* v. *McMichael*, 36 N. J. Law, 92; *Robinson* v. *Lair*, 31 Iowa, 9; *Manning* v. *McClure*, 36 Ill. 490; *Stevenson* v. *Heyland*, 11 Minn. 198; *Currie* v. *Misa*, L. R., 10 Exch. 153; 12 Eng. R. 592. The acceptor of a bill of exchange cannot, therefore, defend against a *bona fide* holder, on the ground that his acceptance was fraudulently obtained by the payee,

and by him indorsed to the holder in payment of an antecedent debt, and without other consideration. *Swift* v. *Tyson*, 16 Pet. 1. Vol. 1, p. 611.

One who takes the note of a third person before it is due, merely as collateral security for a pre-existing debt, giving some new consideration, if it be no more than an extension of time, is also a *bona fide* holder, and is protected against prior equities. *Depeau* v. *Waddington*, 6 Whart. 220; 2 Am. Lead. Cas. 146; *Munn* v. *McDonald*, 10 Watts, 270; *Bosanquet* v. *Dudman*, 1 Stark. 1; *Carson* v. *Hill*, 1 McMull. 76; *Chicopee Bank* v. *Chapin*, 8 Metc. 40; *Smith* v. *Isaacs*, 23 La. Ann. 454; *Lindsay* v. *Chase*, 104 Mass. 253; *Bonaud* v. *Genesi*, 42 Ga. 639. Even the neglect of the creditor to take the usual measures to hold the parties to negotiable securities received by him as collateral security is no defense to the original debtor, unless he has received actual injury therefrom. *McLughan* v. *Bovard*, 4 Watts, 308.

It is no defense to the maker, indorser or surety on a note, who signed for the accommodation of another, without restricting its use, as against one who received it in good faith, in payment for a pre-existing debt, that the person for whose accommodation it was made or indorsed fraudulently diverted it from the purpose for which it was intended (*Grocers' Bank* v. *Penfield*, 59 N. Y. (24 Sick.) 502; *Quinn* v. *Hard*, 43 Vt. 375; 5 Am. Rep. 284; *Seneca Co. Bank* v. *Neass*, 3 N. Y. 442; *Merchants' Nat. Bank* v. *Comstock*, 55 id. 24; 14 Am. Rep. 168); and the same is held in Maryland, when such note is transferred as collateral security. *Maitland* v. *Citizens' Nat. Bank*, 40 Md. 540; 17 Am. Rep. 620. Nor is it a defense to an ordinary indorser of a bill or note that the holder received thereon from the principal debtor, when overdue, a time bill or note; unless there was an agreement that it should operate as a payment, or an extension of time in favor of some prior party. *Taylor* v. *Allen*, 36 Barb. 294.

A surety in a bond is not released by the holder's taking notes from the principal debtor, if there is no express agreement to suspend the right of action on the bond, or if the creditor clearly expresses his intention still to hold the surety. *Paine* v. *Voorhees*, 26 Wis. 522.

§ 4. **Rights of creditors.** It is the right of a creditor to receive as many securities for his debt as the debtor sees fit to give; and if the several securities so taken are in equal degree, there will be no merger of the earlier in the later ones. *Andrews* v. *Smith*, 9 Wend. 53; *Millard* v. *Whitaker*, 5 Hill, 408.

This subject has been to a considerable extent anticipated in the preceding sections; from which it will appear that if the taking of a bill or note for a debt, pre-existing or contemporaneous, does not amount

to a payment or satisfaction, the creditor may, upon its non-payment at maturity, sue on the original debt. *Vansteenburgh* v. *Hoffman*, 15 Barb. 28. And if such instrument was invalid, or he was induced to take it by fraud, he may rescind the transaction, and sue on the original demand immediately. If the circumstances under which he took the instrument make him a *bona fide* holder for value, he can sue and recover thereon, notwithstanding any equities between prior parties. This is fully illustrated in the chapter on Bills and Notes, in Vol. 1 of this work.

§ 5. **Duties of creditor.** A creditor who has received the bill or note of his debtor for his debt, and upon its non-payment at maturity, sues on the original debt, must, as before stated, produce and cancel it on the trial, or show that it is lost or destroyed, or otherwise not in a condition to be enforced against the debtor. *Holmes* v. *DeCamp*, 1 Johns. 34; *Angel* v. *Felton*, 8 id. 149; *Smith* v. *Lookwood*, 10 id. 366; *Burdick* v. *Green*, 15 id. 269; *Miller* v. *Lumsden*, 16 Ill. 161; *Mathews* v. *Dare*, 20 Md. 248. If he has transferred such bill or note, his claim against the original debtor is extinguished, because the maker is liable thereon to the holder.

As against a non-negotiable note, the maker can generally avail himself of all equities in defense against any holder; but where such instruments are by law transferable free from equities arising subsequent to notice of the transfer, there seems to be no reason why the debtor should not have the right to demand its production on the trial.

If the negotiable paper received was forged, it is the duty of the creditor to return it within a reasonable time after the discovery of that fact, so that the debtor may avail himself of his recourse back to the person from whom he received it. *Jones* v. *Ryde*, 5 Taunt. 488; *Markle* v. *Hatfield*, 2 Johns. 455; *Thomas* v. *Todd*, 6 Hill, 340.

A creditor who accepts the bill or note of a third party, either as conditional payment of a debt, or as collateral security thereto, also accepts and undertakes the duty of making it available for the purpose for which it was given him, and he will not be permitted to enforce the original right of action against his debtor, while retaining and misapplying the means of obtaining satisfaction from another. *Kearslake* v. *Morgan*, 5 Term, 513; *Chamberlyn* v. *Delarive*, 2 Wils. 353; *Smith* v. *Wilson*, Andrews, 187; 2 Am. Lead. Cas. 183, 196, 261–3.

He must, therefore, take the usual and proper steps to collect the security in his hands, and to charge all the parties who would be liable over to his debtor, otherwise the latter will be discharged. *Hickling* v. *Hardey*, 7 Taunt. 312; *Mussen* v. *Price*, 4 East, 147; *Copper* v.

*Powell*, Anth. N. P. 68; *Peacock* v. *Pursell*, 14 C. B. (N. S.) 728; *Shipman* v. *Cook*, 1 C. E. Green (N. J.), 251; *Mehlberg* v. *Tisher*, 24 Wis. 607. As to what proceedings are necessary for that purpose, it is sufficient here to refer generally to the chapter on Bills and Notes, Vol. 1, pp. 618, etc.

A creditor who surrenders a draft received by him on account of a debt, upon delivery to him of a check for the amount, is under no obligation to use more than ordinary diligence to charge the maker, in order to retain his remedy against the parties to the draft, if the check is dishonored. *Johnson* v. *Bank of North America*, 5 Robt. 554. His neglect to present the check the same day is not sufficient to discharge the drawers of the draft. *Smith* v. *Miller*, 6 Robt. 157; 6 Abb. (N. S.) 234.

If a debtor transfers a non-negotiable note by indorsement in payment of his own debt, it is not necessary to give the debtor notice of its non-payment by the maker, in order to retain his remedy against him. *Plimley* v. *Westley*, 2 Bing. N. C. 249; *Hill* v. *Lewis*, 1 Salk. 132. Whether considered as joint maker, or as indorser, he is liable on the original debt in such a case. *Tyler* v. *Stevens*, 11 Barb. 485; *Torry* v. *Hadley*, 27 id. 192. A creditor receiving non-negotiable certificates of deposit, without special agreement to receive them as payment, is not bound to sue the bankers, nor to use any more than ordinary diligence to charge them or notify his debtor. *Huse* v. *McDaniel*, 33 Iowa, 406.

§ 6. **Burden of proof.** If a debtor sets up as a defense to an action by his creditor on the original debt, that the latter has received from him a note or bill in payment thereof, the burden of proof is on him to show that it was received in payment; and he must show either an agreement to that effect, or that by the laches of the creditor a loss has been incurred. *Darnall* v. *Morehouse*, 36 How. Pr. 511; *Crane* v. *McDonald*, 45 Barb. 354; *Gibson* v. *Toby*, 53 id. 191; *Haines* v. *Pearce*, 41 Md. 221; *Bradford* v. *Fox*, 38 N. Y. 289; *Brown* v. *Olmsted*, 50 Cal. 162.

And if the defense be, that the creditor received the debtor's own note as payment, the latter must not only show that it was so received, but that it has been paid; but the creditor cannot recover in such a case without producing and canceling the note, or showing its loss. *Elwood* v. *Diefendorf*, 5 Barb. 398.

The presumption that, when a vendor takes from his vendee, at the time of the sale, the note or bill of a third person, he takes it as payment, if indulged, throws upon the creditor the burden of proof that it was not so received. *Whitbeck* v. *Van Ness*, 11 Johns. 408. If a

bill drawn by the debtor is shown to have been taken by the creditor as payment, on condition that it shall be in full when paid, the burden of proof is upon the creditor to show that the bill is in his hands, and still unpaid, and to prove or excuse presentment and notice. *Dayton* v. *Trull*, 23 Wend. 345 ; 2 Am. Lead. Cas. 167, and notes 190, 196.

If, in an action upon the instrument transferred, it is shown to have been so transferred contrary to the agreement with an accommodation party, the holder must show that he paid value therefor. 2 Parsons on Bills, 438 ; *Millis* v. *Barber*, 1 M. & W. 425 ; *Perrin* v. *Noyes*, 39 Me. 384 ; *Grey* v. *Bank of Kentucky*, 2 Litt. 378 ; *Fitch* v. *Jones*, 5 E. & B. 238 ; 32 Eng. L. & Eq. 134 ; *supra*, Vol. 1, p. 611.

If the defendant seeks to impeach the plaintiff's title, by alleging fraud or breach of duty on the part of the payee, and notice of equities to the holder, it is for him to establish those facts. *Carpenter* v. *Longan*, 16 Wall. 271 ; *Maitland* v. *Citizens' Bank*, 40 Md. 540 ; 17 Am. Rep. 620.

In a suit by one to whom notes were pledged as collateral security, the burden is on him to show for what debts they were pledged. Id.

§ 7. **Effect of taking note by creditor.** The effect of taking a note or bill, in suspending the remedy upon the original debt, has already been noticed. The receipt of a note for the amount of a simple contract debt has in many cases been held to be *prima facie* payment (*Hutchins* v. *Olcutt*, 4 Vt. 555 ; *Reed* v. *Upton*, 10 Pick. 522 ; *Jones* v. *Kennedy*, 11 id. 125 ; *Wood* v. *Bodwell*, 12 id. 268 ; *Plankinhorn* v. *Cave*, 2 Yeates, 370 ; *Paine* v. *Dwinel*, 53 Me. 52), especially if such note is with surety or guaranty, or is otherwise secured. *Curtis* v. *Ingham*, 2 Vt. 287 ; *Torrey* v. *Baxter*, 13 id. 452 ; *Rowe* v. *Collier*, 25 Tex. 252. But this presumption may be rebutted. *Parham S. M. Co.* v. *Brock*, 113 Mass. 194 ; *Wemet* v. *Missisquoi L. Co.*, 46 Vt. 458 ; *Kimball* v. *The Anna Kimball*, 2 Cliff. 4 ; *Ward* v. *Bourne*, 56 Me. 161 ; *Dorman* v. *Wilson*, 39 N. J. Law (10 Vr.) 474.

But, as we have seen, an express agreement, or circumstances showing that to be the intention of the parties, must, in general, be shown, and this presumption must ordinarily, if not always, be limited to a conditional payment, merely suspending the creditor's remedy.

If a judgment creditor takes the note of his debtor for the amount of his execution, and gives a discharge, that is *prima facie* evidence of payment. *Day* v. *Stickney*, 14 Allen, 255. If the payee of a note surrenders it to the maker, and receives in its stead the note of a stranger to the original debt, without indorsement, that extinguishes the original demand. *Dennis* v. *Williams*, 40 Ala. 633.

But the receipt by a lessor, of notes for the installments of rents stipulated in his lease, and payable at the times when those installments became due, is not payment, even though the notes are negotiable, so long as they are not negotiated. *Sutliff* v. *Atwood*, 15 Ohio St. 186.

# CHAPTER XI.

## CONSIDERATION, FAILURE OF.

### ARTICLE I.

#### GENERAL RULES AND PRINCIPLES.

**Section 1. In general.** In order to give validity to a contract, *as between the parties*, it is indispensably necessary that it should be predicated upon a sufficient consideration, or it is a mere *nudum pactum*, and not enforceable either at law or in equity; and the same rule prevails, when the consideration, upon which the promise rests, fails, either in whole or in part. *Cabot* v. *Haskins*, 3 Pick. 83; *Logan* v. *Matthews*, 6 Penn. St. 417; *Gould* v. *Armstrong*, 2 Hall (N. Y.), 266; *Couturier* v. *Hastie*, 5 H. L. Cas. 673; *Gough* v. *Findon*, 7 Exch. 48. Thus, if a person subscribes a certain sum for a specific purpose, upon condition that certain things shall be done, unless the condition is performed the subscription cannot be enforced, because the consideration upon which it was made has failed. *Brewers' Fire Ins. Co.* v. *Burger*, 10 Hun (N. Y.), 56. Neither can the collection of a note be enforced by the original payee, when the consideration upon which it was given fails. Thus, when a note is given in settlement of a supposed balance due from the maker to the payee, if it turns out that the balance was produced by reason of a mistake in computation, and that there was in fact *nothing* due from the maker of the note to the payee, there can be no recovery thereon, because the consideration upon which it was given has totally failed. *Mercer* v. *Clark*, 3 Bibb (Ky.), 224. If there is an apparent consideration, the rule is not changed, if it is in fact invalid, or a nullity. Thus, where an executor, upon notes of his testator for payment, which were genuine, and upon their face purported to be for a good consideration, paid a portion of the amount and promised to pay the balance; but in fact there was no consideration for the notes, but they were given as a mark of respect on the part of the testator for the payee, it was held that they could not be enforced against the estate, because the part payment and promise to pay by the executor gave them no more validity than they possessed before, because the promise

had no valid consideration to support it. *Gough* v. *Findon*, 7 Exch. 48. This principle is well illustrated by Pothier, in his work upon Obligations, part 1, chap. 1, art. 3, § 6. He says: "If, upon the false supposition that I owe you a £1,000, left you by the will of my father, which has been revoked by a codicil, whereof I am not apprised, I engage to give you a certain estate in discharge of that legacy, the contract is null, and the falseness of the cause being discovered, you are not only without any right of action to compel me to deliver the estate, but even if I had delivered it, I am entitled to reclaim it." As to the last proposition, see *Cripps* v. *Reade*, 6 T. R. 606; *Robinson* v. *Anderson*, Peake, 94; *Gingell* v. *Glasscock*, 8 Bing. 86; *Young* v. *Cole*, 3 Bing. N. C. 724.

In order to constitute a valid, legal consideration, it is not necessary that each party to the contract should derive an equal benefit or advantage therefrom (*Randle* v. *Harris*, 6 Yerg. [Tenn.] 508); it is enough if any thing is performed, or agreed to be performed, which the party is under no legal obligation to perform, or if any thing is given or done as the consideration or inducement for the promise, whereby the promisor or person making the promise has made or secured for himself some advantage or benefit, however slight, or whereby the promisee or person to whom the promise is made has sustained some loss, or been put to some trouble, or has suffered some injury or inconvenience. The law does not measure advantages, but if there is no fraud and the parties are legally competent to contract, if there is *any* consideration for the contract, it will be upheld although the benefit upon the one side is altogether out of proportion with the advantages on the other (*Brooks* v. *Haigh*, 10 Ad. & El. 320; *Wilkinson* v. *Oliveria*, 1 Bing. N. C. 490; *Thomas* v. *Thomas*, 2 Gale & Dav. 226; *Harlan* v. *Harlan*, 20 Penn. St. 303); or, even though the other party derives no advantage or benefit whatever therefrom. As if A should promise B that if he would perform certain labor for C, he would pay him therefor, A would be legally bound to pay B, although C alone was benefited by the labor. *Smith* v. *Watson*, 14 Vt. 332; *Williams* v. *Brickell*, 37 Miss. 682; *White* v. *Mastin*, 38 Ala. 147. Thus, it will be seen that the question as to the sufficiency of a consideration to uphold a contract does not depend upon the relative advantages derived by the parties therefrom, but depends wholly upon the question whether the party seeking to enforce it has done any act in consideration thereof, for the other party, that he was not legally bound to do, or has parted with any property or interest that he was not legally or morally bound to part with. Thus, a promise to pay the debt of another, *after* it is created, is not enforceable, unless the creditor has

thereby been induced to forbear the bringing of an action, or has given up some security (*Gilman* v. *Kibler*, 5 Humph. [Tenn.] 19; *Cutler* v. *Everett*, 33 Me. 201; *Comstock* v. *Breed*, 12 Cal. 286; *Pfeiffer* v. *Kingsland*, 25 Mo. 66; *Beall* v. *Ridgeway*, 18 Ala. 117); and the liability is the same, whether the agreement is in writing or by parol. In *all* cases where the consideration is past, a promise is not enforceable as against a third person, unless there is some new consideration upon which to predicate it (*Mosby* v. *Leeds*, 3 Call [Va.], 439; *Cook* v. *Bradley*, 7 Conn. 57; *Clark* v. *Small*, 6 Yerg. [Tenn.] 418; *People* v. *Shall*, 9 Cow. 778); and the same rule applies to the guaranty of a note, as to any other contract. *Tenney* v. *Prince*, 7 Pick. 243; *Aldridge* v. *Turner*, 1 Gill & J. (Md.) 427. See Vol. 1, tit. Bills and Notes. A promise made in a consideration that the other party will do some act that he is bound to do irrespective of the promise, is without consideration, as a promise made to induce one to comply with an existing valid contract with a stranger (*Johnson* v. *Sellers*, 33 Ala. 265); or to pay a reward to an officer for the apprehension of a criminal, whom he is legally bound to apprehend (*Smith* v. *Whilden*, 10 Penn. St. 39); or a promise to pay a sheriff extra fees for serving a process (*Dew* v. *Parsons*, 2 B. & Ald. 562); or a witness for loss of time (*Collins* v. *Godefroy*, 1 B. & Ad. 950); or a servant, for extra services that it is his duty to perform under the contract (*Harris* v. *Carter*, 3 E. & B. 559; *Stilk* v. *Myrick*, 2 Camp. 317; *Sweany* v. *Hunter*, 1 Murph. 181); or by a creditor to his debtor to remit a part of a debt (*Jenness* v. *Lane*, 26 Me. 475; *Fairchild* v. *Warren*, 21 How. [N. Y.] 187; *Watts* v. *Frenche*, 19 N. J. Eq. [4 Green] 407); and generally, a promise in consideration that a person will perform a plain legal duty is without consideration. *Lemaster* v. *Burckhart*, 2 Bibb, 27; *Mollyneaux* v. *Collier*, 13 Ga. 406; *Goodale* v. *Holridge*, 2 Johns. 193; *Johnson* v. *Sellers*, 33 Ala. 265; *Norris* v. *Slaughter*, 3 Iowa, 116.

A voluntary promise to do that which the promisor is under no legal obligation to perform is without consideration, and therefore not enforceable. Thus, a voluntary promise to procure insurance upon certain property for another is not binding, and if it is not performed, and the property is destroyed, an action will not lie against the promisor for the damage, because by his promise, the promisor was under no more legal obligation to perform than he was before it was made (*Thorn* v. *Deas*, 4 Johns. 84); and generally, where the promise is gratuitous, it is not enforceable, however just it might be that it should be performed. *Littlejohn* v. *Patillo*, 2 Hawks (N. C.), 302; *Washington, etc., Bank* v. *Farmers' Bank*, 4 Johns. Ch. 62. If the promise is gratuitous, it

derives no validity from the fact that the party is under a moral obligation to perform it, unless there is an antecedent *legal* obligation; a mere moral obligation will not support a promise. When, however, the antecedent original consideration is sufficient to sustain the promise, but the right of action is suspended or barred by some positive rule of statutory or common law, the debtor may, by a subsequent promise, waive the exception which the law has interposed indirectly for his benefit, but mainly from reasons of sound policy. But this principle applies only to cases where the right of action is extinguished by operation of law, and not to those extinguished by the acts of the parties themselves. *Shepard* v. *Rhodes*, 7 R. I. 470; *Montgomery* v. *Lampton*, 3 Metc. (Ky.) 519. But a mere moral obligation, without any antecedent legal obligation, is insufficient. *Cobb* v. *Cowdery*, 40 Vt. 25; *Turner* v. *Patridge*, 3 Pen. & W. 172; *Mills* v. *Wyman*, 3 Pick. 207; *Cook* v. *Bradley*, 7 Conn. 57; *Updike* v. *Titus*, 13 N. J. Eq. 151. A promise, in consideration of part payment of a note at the day it is due, that the creditor will give time for the payment of the balance, is a mere naked promise, because the promisee by the payment of the money has done no more than he was legally bound to do; but the rule is otherwise if the promise is in consideration of a payment made *before* payment becomes due, because, in the latter case, the debtor has done that which he was under no legal obligation to do. *Price* v. *Cannon*, 3 Mo. 453; *Liening* v. *Gould*, 13 Cal. 598; *Pemberton* v. *Hoosier*, 1 Kans. 108. As previously stated, in order to constitute a sufficient consideration for a contract, it is not essential that the promisor should be directly benefited; it is sufficient if something valuable flows from the person to whom it is made, or that he suffers some prejudice or inconvenience, *and that the promise is the inducement thereto.* *Clark* v. *Sigourney*, 17 Conn. 511; *Dorwin* v. *Smith*, 35 Vt. 69; *Brown* v. *Ray*, 10 Ired. L. 72; *Hilton* v. *Southwick*, 17 Me. 303; *Doyle* v. *Knapp*, 4 Ill. (3 Scam.) 334. A contingent benefit is sufficient (*Newhall* v. *Paige*, 10 Gray, 366); or a supposed benefit (*Odineal* v. *Barry*, 34 Miss. 171); or an advantage to be derived by a third person. *Watt* v. *Rice*, 1 La. Ann. 280); or any loss, trouble or disadvantage to the promisee (*Warren* v. *Whitney*, 24 Me. 561; *Ainsworth* v. *Backus*, 5 Hun [N. Y.], 414; *Tompkins* v. *Phillips*, 12 Ga. 52); or a promise by one, in consideration of a promise by another if simultaneously made (*Tucker* v. *Wood*, 12 Johns. 190; *Funk* v. *Hough*, 29 Ill. 145; *Con. Soc. of Troy* v. *Perry*, 6 N. H. 164; *Downey* v. *Hinchman*, 25 Ind. 453); as mutual promises of marriage (*Wightman* v. *Coates*, 15 Mass. 1); or a promise by one to sell and of another to buy certain property (*Boies* v. *Vincent*, 24 Iowa, 387); or a

promise by sureties to divide the loss between them(*Phillips* v. *Preston*, 5 How. [U. S.] 278); a substitution of securities (*Smucker* v. *Larimore*, 21 Ill. 267); a promise made in consideration of marriage. *Barr* v. *Hill*, Add. 276; *Garvin* v. *Cromartie*, 10 Ired. L. 174; *Vance* v. *Vance*, 21 Me. 364. A subscription to a common object with others, although gratuitous, creates a legal liability (*State Treasurer* v. *Cross*, 9 Vt. 289; *Norton* v. *Janvier*, 5 Harr. [Del.] 346; *McDonald* v. *Gray*, 11 Iowa, 508); and if in pursuance thereof, and in reliance thereon, advances have been made, liabilities incurred or any thing has been done before the subscription has been withdrawn, its collection may be enforced (*Pryor* v. *Cain*, 25 Ill. 292; *Doyle* v. *Glasscock*, 24 Tex. 200; *Eycleshimer* v. *Van Antwerp*, 13 Wis. 546); and the fact that it is a mere donation, and that the subscribers derive no personal advantage or benefit therefrom, does not change the rule. *Collier* v. *Baptist Educational Society*, 8 B. Monr. (Ky.) 68. When the consideration upon which a contract is made fails *in toto*, the contract is valid, although there was void originally an apparent consideration. Thus, if A agrees to build a house for B, in consideration that B will convey to him a certain piece of land, if, before performance by A, it becomes impossible for B to convey the land to A, either because he has conveyed it to another, or because it has been sold upon legal process, or mortgage, or because B's title thereto, from *any* cause, has been divested, the consideration of the contract has failed, and A is absolved from performance, or if he has performed, may recover of B in assumpsit for the value of his services. *Campbell* v. *Campbell*, 65 Barb. 645. So, if a contract is entered into for the purchase of personal property, and the vendor's title thereto is wholly invalid, or the property is of *no* value, the contract cannot be enforced against the purchaser. As, if a note is given for the purchase of a patent right, or for the sale of a right under a patent, if the patent turns out to be void, there is a failure of consideration, and the note is not collectible in a suit in the name of the payee thereof, or of any indorser who is affected with notice of the consideration. *Head* v. *Stevens*, 19 Wend. 411.

So if a contract is entered into, which, at the time is lawful, and for any lawful purpose, but which subsequently becomes unlawful by reason of the enactment of a statute, the consideration thereof has failed, and it is not enforceable against either party, except to the extent that it had been performed *before* it became unlawful. Thus, if A contracts with B to build a bowling-alley for him, and to commence the work at a stated time, and before the period arrives, an act is passed prohibiting the building or maintaining of bowling-alleys, B cannot recover for work done or material furnished *after* the statute took effect,

simply because the contract was legal when entered into. Having become unlawful before performance was commenced, the consideration upon which it was predicated has failed, and he is absolved from further performance. So, if performance had been commenced before the passage of the act, but before completion he could not recover for any part of the work done or material furnished *after* the act took effect. But if the contract had been fully performed, the fact that its subject-matter subsequently became unlawful will not destroy the consideration, and B will be chargeable for the contract price (*Bradford* v. *Jenkins*, 41 Miss. 328; *McCauley* v. *Brooks*, 16 Cal. 11; *Mays* v. *Williams*, 27 Ala. 267), and the same rule prevails where part of the consideration was lawful. The courts will enforce payment for all that was legal, but not for that which was illegal (*Darling* v. *Rogers*, 22 Wend. 483; *Baily* v. *Milner*, 35 Ga. 330; *Bagg* v. *Jerome*, 7 Mich. 145; *Judah* v. *Trustees, etc.*, 16 Ind. 56), and this is the rule even though both parties desire that it shall be enforced. *Fowler* v. *Scully*, 72 Penn. St. 456; 13 Am. Rep. 699. When the consideration or subject-matter of a contract is illegal, it cannot be enforced, both because there is no consideration for the contract, and because its enforcement is opposed to the policy of the law. Therefore, a contract for the performance of an immoral act, or for the promotion of immorality, is utterly void (*Forsythe* v. *State*, 6 Ohio, 21; *Toler* v. *Armstrong*, 11 Wheat. [U. S.] 464; *Spalding* v. *Preston*, 21 Vt. 9; *Merrick* v. *Trustees*, 8 Gill [Md.], 59), and the same rule prevails where the subject-matter of the contract relates to matters which are illegal either by the provisions of a statute or at the common law (*Fivaz* v. *Nichols*, 2 C. B. 501; *Holman* v. *Johnson*, 1 Cowp. 343), and a contract which is, for either of these causes, void in part, is void *in toto* (*Filson* v. *Himes*, 5 Penn. St. 452; *Williams* v. *Tappan*, 23 N. H. 385), unless the undertakings are several, so that the illegal can be separated from that which is legal, and they are in no way dependent upon each other. *Leavitt* v. *Blatchford*, 5 Barb. 9; *Buck* v. *Albee*, 26 Vt. 184; *DeBeerski* v. *Paige*, 36 N. Y. (9 Tiff.) 537.

It is a good defense to an action upon a promise made in consideration of forbearance to sue, that there was no legal cause of action (*Palfrey* v. *Portsmouth, etc., R. R. Co.*, 4 Allen, 55), or to an action upon a promise made in consideration of a privilege granted, that the person granting had no legal power to confer it, as, a promise made to indemnify a city against damage from moving a building, the only consideration being a license granted by the mayor, who had no power to grant it. *Lowell* v. *Simpson*, 10 Allen, 88. In an action to recover for tuition for a specified time, it is a good defense that the promisor

was prevented by illness from availing himself of its benefits, as, in all cases of contracts of this character, there is an implied condition that the sickness of either party shall excuse performance, and where the illness extended through the whole period, the consideration has *entirely* failed, and when it extends to only a *part* of the period, it fails *pro rata*. *Stewart* v. *Loring*, 5 Allen, 306.

§ 2. **When a defense.** As between the parties, and indeed in the case of all non-negotiable contracts as against third persons, either the want, or the failure of a sufficient legal consideration, is a complete defense to an action thereon. And the same rule prevails in reference to negotiable contracts, as notes, bills of exchange, etc., when the person holding the same is affected with notice of the consideration. *Long* v. *Long*, 1 Morr. (Iowa) 43; *Barnum* v. *Barnum*, 9 Conn. 242. Thus, if, upon the face of a contract, there is any thing that should put an indorsee thereof upon inquiry as to the nature of the consideration, he proceeds at his peril and is chargeable with notice of all matters that tend to invalidate it, about which, in view of the circumstances, he *ought* to have inquired; and proof of want of proper caution or gross negligence, or any other relevant fact, may be given as tending to establish knowledge of the defects (*Younker* v. *Martin*, 18 Iowa, 143; *Cooper* v. *Nock*, 27 Ill. 301; *Matthews* v. *Poythress*, 4 Ga. 287), and where a note or other obligation is sold at a large discount, it is sufficient to put a purchaser upon inquiry as to its validity (*Pierce* v. *Ricker*, 16 N. H. 322; *Gould* v. *Stevens*, 43 Vt. 125; 5 Am. Rep. 265); and indeed it may be said to be the rule that, if any third person takes a negotiable security under circumstances that ought to excite the suspicions of a prudent and careful man, it is his duty to make inquiry about it, and if he omits to do so, he takes it subject to all the defenses and equities between the original parties thereto. *Adams* v. *Soule*, 33 Vt. 538; *Essex Co. Bank* v. *Russell*, 29 N. Y. 673; *Hall* v. *Hale*, 8 Conn. 336. But *contra*, see *Phelan* v. *Moss*, 67 Penn. St. 59; 5 Am. Rep. 402; where it is held that *mala fides* should be shown, express notice is not necessary, although if it was given, it lets in all defenses; it is enough if the attending circumstances are of such a positive and pointed character as to cast a shade on the transaction, and put him upon inquiry. *La. State Bank* v. *Orleans Nav. Co.*, 3 La. Ann. 294; *Gould* v. *Stevens*, 43 Vt. 125. But, in order to subject a negotiable instrument to the defenses and equities existing between the parties, the suspicious circumstances must be strong and such as a prudent man would not have disregarded. *Benior* v. *Paquin*, 40 Vt. 191; *Estabrook* v. *Boyle*, 1 Allen, 412; *Magee* v. *Badger*, 30 Barb. 246. The question is, not

whether the circumstances were such as would be likely to excite suspicion and inquiry, but were they such that the purchaser *ought* to have done so. Id.; *Connecticut River Bank* v. *French*, 6 Allen, 313.

The mere fact that a bill, note or other negotiable security has been transferred to a third person does not of itself prevent the interposition of any defense thereto that might have been interposed as between the parties. It must also appear that the indorsee or transferee is a holder thereof *for value*. That is, he must have given value for it, and must own it absolutely

If he took it merely as collateral security for a pre-existing debt the obligation is subject to all the defenses that might have been made as between the parties thereto. *Curtis* v. *Mohr*, 18 Wis. 615; *Easter* v. *Minard*, 26 Ill. 494; *Nutter* v. *Stover*, 48 Me. 163; *Rice* v. *Raitt*, 17 N. H. 116; *Van Wyck* v. *Norvell*, 2 Humph. 192; *Roche* v. *Ladd*, 1 Allen, 436; *Prentice* v. *Zane*, 2 Gratt. 262; *Ruddick* v. *Lloyd*, 15 Iowa, 441; *Royer* v. *Keystone Nat. Bank*, 83 Penn. St. 248.

This rule, however, is not uniform, it being held in several of the States that a note taken by a third person as collateral security for a pre-existing debt, such third person being ignorant of equities existing between the parties thereto, is not subject to such equities. *Grant* v. *Kidwell*, 30 Mo. 455; *Tarbell* v. *Sturtevant*, 26 Vt. 513; *Stevenson* v. *Heyland*, 11 Minn. 198; *State Savings Ass.* v. *Hunt*, 17 Kans. 532; *Citizens' Bank* v. *Payne*, 18 La. Ann. 222; *Bank* v. *Chambers*, 11 Rich. (S. C.) 657; *Cobb* v. *Doyle*, 7 R. I. 550; *Bank of State of N. Y.* v. *Vanderhorst*, 32 N. Y. (5 Tiff.) 553; *Bank* v. *Welch*, 29 Conn. 475; *Robinson* v. *Smith*, 14 Cal. 94; *Manning* v. *McClure*, 36 Ill. 490; *Gibson* v. *Conner*, 3 Ga. 47.

The rule would seem to be, that a negotiable instrument, in order to be operative in the hands of an indorsee, as against equities and defenses existing between the parties, must have been taken by the indorsee *for value*, that is, *he must have parted with something valuable therefor at the time of its transfer* (*The Park Bank* v. *Watson*, 42 N. Y. [3 Hand] 490; S. C., 1 Am. Rep. 573); consequently, it would follow that a person who merely takes and holds such an instrument as collateral security, and who has not parted with any other security, or given up any right in consequence thereof, *is not* a holder for value, and that in his hand, the note or other obligation is subject to all the equities or defenses that might be made between the parties. *Park Bank* v. *Watson*, id.; *Trustees* v. *Hill*, 12 Iowa, 462; *Lee* v. *Smead*, 1 Metc. (Ky.) 628; *Russell* v. *Buck*, 14 Vt. 147; *Davis* v. *Miller*, 14 Gratt. 1.

But if an indorsee parts with any thing valuable for the obligation

and it has not matured he is a holder for value. Therefore, if he takes it in *payment* of a pre-existing debt (*Dixon* v. *Dixon*, 31 Vt. 450; *Allaire* v. *Hartshorne*, 21 N. J. Law, 665; *Carlisle* v. *Wishart*, 11 Ohio, 172; *Outhwite* v. *Porter*, 13 Mich. 533); or as collateral security for a pre-existing debt and in consideration thereof gives up any other security or right (*Ayrault* v. *McQueen*, 32 Barb. 305; *Lee* v. *Smead*, 1 Metc. [Ky.] 628), he takes the instrument freed from all equities and defenses between the parties thereto. But where it is taken, to be in discharge of a pre-existing debt, if the money is realized thereon, the indorsee is not a holder for value. *Scott* v. *Ocean Bank*, 23 N. Y. (9 Smith) 289.

Where a person takes a negotiable security *after* it has become due, he takes it subject to all defenses that exist between the parties thereto. *Bowen* v. *Thrall*, 28 Vt. 382; *Kurz* v. *Holbrook*, 13 Iowa, 562; *Lord* v. *Favorite*, 29 Ill. 149; *Glasscock* v. *Smith*, 25 Ala. 474.

As to contracts or obligations not negotiable, the holder thereof is chargeable with all defects in the consideration, although he takes it for value, and this applies in all cases where the instrument in terms is not negotiable, even though the statute makes it so. *Goodman* v. *Fleming*, 57 Ga. 350. In the case of negotiable securities there is no consideration, if they were given for that to which the payee had no title, or to which the payor was entitled without payment. *Duncan* v. *Hall*, 9 Ala. 129. Thus, a note given to the widow for a debt due her husband is without consideration, because the debt is due to the estate, and not to her. *Bryan* v. *Philpot*, 3 Ired. (N. C.) L. 467; *Sowles* v. *Sowles*, 10 Vt. 181. So is one given for love and affection (*Smith* v. *Kittridge*, 21 Vt. 238), or one founded merely upon a moral obligation (*Nightingale* v. *Barney*, 4 Greene [Iowa], 106), or one that was merely put up as a forfeit to secure the performance of a contract within the statute of frauds (*Weatherley* v. *Choate*, 21 Tex. 272), or to obtain goods wrongfully withheld (*White* v. *Heylman*, 34 Penn. St. 142), or for property represented by the payee to be of great value, or fit for a certain purpose, when it is of *no* value, and not fit for the purpose specified (*Sill* v. *Rood*, 15 Johns. 230), or one given in payment of a supposed claim, when no claim in fact existed (*Bullock* v. *Ogburn*, 13 Ala. 346), or upon the agreement of the payee to do a certain thing, which he has failed to do (*Marsh* v. *Bennett*, 22 Ill. 313; *Miller* v. *Wood*, 23 Ark. 546; *Miller* v. *Ritz*, 3 E. D. Smith [N. Y.], 253), or for property to which the payee had no title (*Tibbets* v. *Ayer*, Hill & D. [N. Y.] 174; *Rock* v. *Nichols*, 3 Allen, 342), or to compound a felony or prevent a prosecution for a crime (*Hearst* v. *Sybert*, Cheves [S. C.], 177), or to pay a debt, which the payee had in fact

previously assigned (*Gillett* v. *Campbell*, 1 Denio, 520), or for an illegal or unfounded claim (*Tucker* v. *Ronk*, 43 Iowa, 80), or for property to which the payee's title failed by reason of its attachment and sale to pay his debts (*Lapene* v. *De La Porte*, 27 La. Ann. 252), or to compromise a suit for bastardy when in fact the woman was not pregnant (*Potter* v. *Marine*, 50 Ind. 444), and generally, when the consideration *totally* fails, or when there was in fact *no* consideration, it may be shown in defense to an action upon the contract, except in the instances previously named. See *Waddington* v. *Oliver*, 2 Bos. & Pul. N. R. 61; *Hill* v. *Buckley*, 17 Ves. 394.

§ 3. **When not a defense.** Neither the total want, or total failure of the consideration of a negotiable contract, can be set up against a holder thereof for value, who took it in the usual course of trade, before maturity, and with no knowledge of any defects in that respect, and an absence of circumstances such as ought to have put him upon inquiry in reference thereto. *Crosby* v. *Grant*, 36 N. H. 273; *Adams* v. *Soule*, 33 Vt. 538; *Pratt* v. *Coman*, 37 N. Y. (10 Tiff.) 440; *Robinson* v. *Reynolds*, 2 Q. B. 196.

Nor can this defense be interposed when the failure of consideration transpired *after* the note or contract was negotiated (*Splivallo* v. *Patten*, 38 Cal. 138); nor when the party setting it up was present when the contract was assigned and failed to notify the assignee of the defects therein, or being inquired of, asserted that it was all right. In such a case, he is estopped from denying its validity upon any ground, except for such defects therein as the indorser had notice of. *Lynch* v. *Kennedy*, 34 N. Y. (7 Tiff.) 151; *Sargeant* v. *Sargeant*, 18 Vt. 371; *Tobey* v. *Chipman*, 13 Allen, 123; *Ayres* v. *Mitchell*, 3 Sm. & M. 683; *Adams* v. *Blancan*, 6 Robt. (N. Y.) 334. In no event can a failure of consideration be set up in defense as against an innocent holder, unless it had failed before the instrument was transferred, as a negotiable contract is only subject to such equities and defenses as existed at the time of the transfer. *Peck* v. *Beckwith*, 10 Ohio St. 497; *Elwell* v. *Dodge*, 33 Barb. 336; *Lambert* v. *Jones*, 2 Patt. & H. 144; *Campbell* v. *Rusch*, 9 Iowa, 337. When there is no fraud, warranty or mistake of facts, the parties to a contract are bound thereby, and cannot defend against an action thereon upon the ground that the consideration was inadequate. *McCormick* v. *Malin*, 5 Blackf. 509. If he has received all the consideration he has understandingly and knowingly contracted for, he will not be permitted to say that he got no consideration. *Baker* v. *Roberts*, 14 Ind. 552. It is no defense that the consideration agreed upon exceeds the value of the thing purchased. *Hardesty* v. *Smith*, 3 Ind. 39. If there is *any* value, and the other party was not guilty

of fraud, the contract can be enforced, unless the proof as to the inadequacy of consideration is coupled with proof that the party against whom it is sought to be enforced was possessed of a weak intellect or was intoxicated, or that some undue advantage was taken. *McCormick* v. *Malin*, 5 Blackf. 509. The consideration for a contract need not appear upon its face. But, in the case of simple contracts, unless its terms and obvious import are such that the jury can infer a consideration, it may, and must be proved by parol. *Patchin* v. *Swift*, 21 Vt. 292; *Thompson* v. *Blanchard*, 3 N. Y. (3 Comst.) 335; *Tingley* v. *Cutler*, 7 Conn. 291. But if a consideration is expressed in the writing, no other can be proved, as, if it is expressed to be in consideration of a horse valued at one hundred dollars (*Emery* v. *Chase*, 5 Me. 232); unless the words "and for other considerations" are used. *Cutter* v. *Reynolds*, 8 B. Monr. (Ky.) 596. When the contract imports a consideration, none need be proved (*Attix* v. *Pelan*, 5 Iowa, 336); and in the case of a contract under seal, a consideration is imported, whether expressed or not. *Brewer* v. *Bessinger*, 25 Miss. 86; *Wing* v. *Chase*, 35 Me. 260; *Morrow* v. *Smith*, 10 Mo. 308. See Vol. 2, tit. *Deeds*.

§ 4. **As a partial defense.** As between the parties to a contract, a partial failure of consideration operates as a defense *pro tanto*. *Johnson* v. *Johnson*, 3 Bos. & Pul. 162; *Baylor* v. *Morrison*, 2 Bibb (Ky.), 103. Thus, if A executes his note to B for a certain sum in consideration that B will deliver him a specified quantity of property at an agreed price, and of a certain quality, within a specified time, if B does not deliver the whole quantity of the property within the time agreed, A is entitled to have the note reduced to the extent of the value of the property not delivered, as well as to the extent of the damages he has sustained by reason of the non-delivery. *Nations* v. *Thomas*, 25 Tex. Supp. 221; *Nichols* v. *Hunton*, 45 N. H. 470; *Schuchmann* v. *Knoebel*, 27 Ill. 175. But if there has been no offer to rescind the contract, the defendant cannot avail himself of a partial failure of consideration. *Burton* v. *Schermerhorn*, 21 Vt. 289. If the thing which was the consideration of the note sued on was not wholly worthless, the consideration is sufficient to entitle the payee to recover the full amount (*Clark* v. *Peabody*, 22 Me. 500); and, to the extent of the failure of the consideration, the maker is entitled to have the note reduced. *Corbin* v. *Sistrunk*, 19 Ala. 203; *Andrews* v. *Wheaton*, 23 Conn. 112.

Thus, in an action upon a note given for the price of land, the defense was, that the land was sold by the acre, and that there was fraud, or a mistake as to the computation, and that there was in fact a less number of acres than the note was given for. The court held that the

defendant was entitled to have the note reduced *pro rata*. *Hamilton* v. *Conyers*, 28 Ga. 276.

Where land is sold as being free from incumbrances, and a note given for the price by the purchaser, if there are incumbrances which he is compelled to pay, such sums so paid may be deducted in an action on the note. *Schuchmann* v. *Knoebel*, 27 Ill. 175.

Where a note was given for the use of a stallion for the season, it was held, that though the stallion was sick for a time, if the plaintiff had not been notified thereof, and no offer to return him was shown, this was not a good defense to the note upon the ground of a partial failure of consideration, because there was no warranty that the horse would be able to perform the service expected of him, and the defendant got all he contracted for, to wit: the use of the stallion for the season (*Garrett* v. *Heaston*, 5 Blackf. [Ind.] 349), and in all cases, when the party gets all that he contracted for, in the absence of fraud or an express warranty, he will not be permitted to show that he got less than he expected (*Baker* v. *Roberts*, 14 Ind. 552), or that the consideration agreed upon exceeds the value of the property purchased. *Hardesty* v. *Smith*, 3 Ind. 39.

Thus, if A purchases a horse of B, and agrees to pay him a certain price therefor, and there was no fraud or warranty upon the sale, he cannot defend against an action for the price agreed to be paid, upon the ground that the horse was not worth that sum by reason of some unsoundness or other defect. *Baker* v. *Roberts*, 14 Ind. 552. Under such circumstances, he purchased the property upon his own judgment, and if he received less than he expected, he cannot set up the inadequacy of consideration in defense, but must abide the consequences of his folly. *Reed* v. *Prentiss*, 1 N. H. 174; *Troy Academy* v. *Nelson*, 24 Vt. 189; *Hubbard* v. *Coolidge*, 1 Metc. (Mass.) 84.

The rule may be said to be, that the fact, that property sold turns out to be wholly worthless, is no bar to a recovery of the full price agreed upon unless the seller warranted them to be of a certain quality, or was guilty of fraud in their sale. *Poulton* v. *Lattimore*, 9 B. & C. 259; *O'Neal* v. *Bacon*, 1 Houst. (Del.) 215.

But if there is an express warranty, or fraud is shown, the purchaser is entitled to have the recovery reduced to such a sum as covers merely the value of the property as it was at the time of sale. *Dounce* v. *Dow*, 57 N. Y. (12 Sick.) 16; *Taylor* v. *Cole*, 111 Mass. 363. Vol. 5, tit. *Sale*.

Where a note was given for a shingle machine, *and* for the exclusive right to use the same, within a certain district under a patent claimed by the plaintiff; the patent proving void, it was held that the maker

was entitled to have the note reduced to the agreed value of the shingle machine (*Earl* v. *Page*, 6 N. H. 477), and generally, in all cases where the law implies a warranty, a failure in that respect may be set up in defense to an action for the price, either *in toto* or *pro tanto*, according to the circumstances. *Earl* v. *Page*, 6 N. H. 477; *Dounce* v. *Dow*, 57 N. Y. (12 Sick.) 16; *Gurney* v. *Atlantic R. R. Co.*, 58 N. Y. (13 Sick.) 358.

So, where by legal proceedings, subsequent to the giving a note, the maker is compelled to pay a part of the amount to a third person, as, where he has been held as trustee of the payee, he is entitled to defend against an action upon the note, to the extent of the amount that he has paid in pursuance of the judgment against him as such trustee. *Peterson* v. *Johnson*, 22 Wis. 21. So, where property is purchased by one for another, and the person purchasing it told the principal that he paid a certain sum for it, which was $100 more than he in fact paid, and the principal gave him his note for such sum, it was held that the note was without consideration to the extent of the $100, and that a recovery could only be had for the balance. *Keller* v. *Vowell*, 17 Ark. 445.

So, where a note was given in consideration of the transfer of certain judgments, and the payee of the note had collected some of the judgments, it was held that the maker of the note was entitled to have it reduced to the extent of the amount collected. *Harper* v. *Columbus*, 35 Ala. 127. So where a note was given for the payee's interest in a certain land association, and as an inducement to the purchase the payee agreed to pay certain "choice" money to the association, but he failed to do so, in consequence of which the defendant received no dividend, it was held that the defendant was entitled to have the note reduced by a sum equal to the amount of the dividends that he would have received if the choice money had been paid, and the amount of choice money that should have been paid. *Purkett* v. *Gregory*, 3 Ill. (2 Scam.) 44. In the absence of an express warranty, the mere fact the vendor has been guilty of fraud would entitle the vendee of property to return it and rescind the contract, yet, the taking by him, of any benefit under the contract, is an election to ratify it, which estops him from setting up such fraud by way of defense, either in whole or in part. He will not be permitted to deal with the subject-matter, and afterward disaffirm it. *Cobb* v. *Hatfield*, 46 N. Y. (1 Sick.) 533. But this is only the case where the person charged with the ratification was cognizant of the fraud. *Clarke* v. *Lyon County*, 7 Nev. 75. And, even where there is an express warranty, if the vendee accepts the goods, after examination, he is, in the absence

of fraud on the part of the vendor, bound to pay the full contract price therefor. *Chapman* v. *Dease*, 34 Mich. 375; *Scranton* v. *Mechanics' Trading Co.*, 37 Conn. 130. The rule is, that if a purchaser, after examination, *or an opportunity therefor*, accepts goods sold to him at a certain price, he cannot afterward, in an action for the price, in the absence of fraud set up that the goods were not of the quality agreed upon, unless the defects were such as could not have been ascertained upon inspection and there is an express warranty. *McCormick* v. *Sarson*, 45 N. Y. (6 Hand) 265; 6 Am. Rep. 80. But if the vendor was guilty of fraud, an acceptance based upon an examination is not binding. *Johnson* v. *Luxton*, 9 Jones & Sp. (N. Y.) 481. See Vol. 5, p. 579.

§ 5. **Who may make the defense.** The defense of want, or failure of the consideration, may be made by any party to the contract, who is directly or contingently liable thereon; as by the contractor himself, or a surety, or any person who stands in such a relation to the contract that he can be legally compelled to perform it, or to respond in damages for its non-performance. This rule applies in favor of an indorser of a note or bill; a guarantor, an acceptor; or surety. *Noble* v. *Walker*, 32 Ala. 456; *Sawyer* v. *Chambers*, 44 Barb. 42. But an accommodation indorser cannot avail himself of a breach of warranty, but may of counter-claim or recoupment. *Gillespie* v. *Torrance*, 25 N. Y. (11 Smith) 306.

§ 6. **Against whom.** This defense can only be made as between the parties to the original contract when it is negotiable, unless the indorsee thereof had notice or knowledge of the equities existing between the parties at the time of its purchase. *Livermore* v. *Johnson*, 27 Miss. 284; *Knapp* v. *Lee*, 3 Pick. 452; *Skillman* v. *Titus*, 32 N. J. Law, 96. But when the contract is not in terms negotiable, even though it is made so by statute, want or failure of consideration may be shown in a suit thereon by an assignee; and the fact that he purchased in good faith and in ignorance of the facts will not render the defense less available. *Aldrich* v. *Stockwell*, 9 Allen, 45; *Herbert* v. *Ford*, 29 Me. 546; *Morgan* v. *Fallenstein*, 27 Ill. 31; *Sumwalt* v. *Ridgely*, 20 Md. 107. But this defense is not available between the drawer and drawee of a bill of exchange (*Kortepeter* v. *List*, 16 Ind. 295); nor between the maker of a note and a holder thereof for value, who took the same in the usual course of trade before maturity. *Harlow* v. *Boswell*, 15 Ill. 56; *Holeman* v. *Hobson*, 8 Humph. 127. An acceptor of a bill of exchange or order cannot set up a want of consideration as between the drawer and payee by way of defense to an action brought by an indorsee thereon. He has no right to inquire into the considera-

tion (*Smith* v. *Adams*, 14 La. Ann. 409; *Scarborough* v. *Geiger*, 1 Bay [S. C.], 368); nor can he deny that he has funds (Id.); unless the bill or order is conditional, or drawn to be paid out of a fund which he has not received, but expects *to* receive, in which case he may show that the fund never came into his hands, or that it was entirely absorbed by prior claims. *Glidden* v. *McKinstry*, 28 Ala. 408.

When a person takes a negotiable security with notice of the facts (*Davis* v. *Henderson*, 25 Miss. 549; *Otis* v. *Adams*, 41 Me. 258); or under such circumstances as ought to put a prudent man upon inquiry (*Fowler* v. *Brantley*, 14 Pet. 318; *Adams* v. *Soule*, 33 Vt. 538; *Hall* v. *Hale*, 8 Conn. 336); or after it has become due (*Bowen* v. *Thrall*, 28 Vt. 382; *Marsh* v. *Marshall*, 53 Penn. St. 396; *Farris* v. *Catlett*, 32 Mo. 469); or who takes it by assignment instead of by indorsement (*Franklin* v. *Twogood*, 18 Iowa, 515; *Dundas* v. *Bowler*, 3 McLean [C. C.], 397), it is subject to the same defenses that it would be subject to in an action by the original payee (*Miller* v. *Helm*, 2 Sm. & M. 687; *Stevens* v. *Bruce*, 21 Pick. 193; *Miller* v. *Bingham*, 29 Vt. 82); except that only such defenses as existed at the time of transfer can be shown. Defenses that arose afterward are not available, even though the holder knew that there might be offsets against it. *Sadler* v. *White*, 14 La. Ann. 177. Where a note is due immediately after its execution and delivery, the fact that it is transferred does not cut off the defense of want of consideration (*Sackett* v. *Spencer*, 29 Barb. 180); and if it is payable on demand, *with interest*, unless it is transferred within a reasonable time after its execution, it will be subject to all the equities and defenses existing in favor of the maker against the original payee. *Dennett* v. *Wyman*, 13 Vt. 485; *Carlton* v. *Bailey*, 27 N. H. 230; *Herrick* v. *Woolverton*, 41 N. Y. (2 Hand) 581; *Parker* v. *Tuttle*, 44 Me. 459.

A person who does not take a negotiable security in the usual course of trade for value, takes it subject to all equities and defenses, even though he had no notice thereof (*Curtis* v. *Mohr*, 18 Wis. 615; *Sargeant* v. *Sargeant*, 18 Vt. 371; *Fletcher* v. *Chase*, 16 N. H. 38); as, where he takes it as collateral security for a pre-existing debt (*Ryan* v. *Chew*, 13 Iowa, 589; *Jenkins* v. *Schwab*, 14 Wis. 1; *Fenouville* v. *Hamilton*, 35 Ala. 319); or in part payment of a precedent debt. *Chesbrough* v. *Wright*, 41 Barb. 28; *Rhea* v. *Allison*, 3 Head, 176; *Ingerson* v. *Starkweather*, Walk. (Mich.) 346.

§ 7. **How interposed.** The defense of want or failure of consideration should be set up by plea or answer, and cannot be made available under the general issue, when the contract upon its face imports a consideration. But when the plaintiff is put to proof in the first instance to show that there was a valid consideration, the defendant may attack

it under the general issue, as in such a case the fact of consideration is in issue. But when, as in the case of a bill or note, the contract upon its face imports a consideration, the defendant must not only set up the defense by plea or answer, but he takes the burden of establishing it. *Greer* v. *George*, 8 Ark. 131; *Coburn* v. *Odell*, 30 N. H. 540; *Camp* v. *Tompkins*, 9 Conn. 545; *Middlebury* v. *Case*, 6 Vt. 165. In several of the States provision is made by statute as to when and how want or failure of consideration may be availed of as a defense, and the practitioner will find it advisable to consult the statute in a given case. An injunction may be granted to restrain the collection of a note, the consideration of which has failed. *Ewing* v. *Chase*, 2 Del. Ch. 278.

§ 8. **Proof of.** Want or failure of consideration, like any other issue in a cause, may be established by proof tending to show the fact; but, where the contract imports a consideration, the defendant takes the burden of establishing it, and he must do this by such evidence as fairly overcomes the inference arising from any recitals in the contract itself, that *prima facie* import a good and sufficient consideration. *Pryor* v. *Coulter*, 1 Bailey (S. C.), 517; *Phelps* v. *Younger*, 4 Ind. 450; *Greer* v. *George*, 8 Ark. 131. Thus, in the case of a note he may show that the note was executed in order to obtain possession of property which the payee wrongfully withheld from him (*White* v. *Heylman*, 34 Penn. St. 142); or under an erroneous supposition that a certain state of facts existed, entitling the payee to compensation, when such facts did not exist (*Bullock* v. *Ogburn*, 13 Ala. 346); or in liquidation of a supposed claim, when, in fact, no such claim existed (*Sullivan* v. *Collins*, 18 Iowa, 228); or for property to which the payee had no title (*Duncan* v. *Hall*, 9 Ala. 129); or for the settlement of a claim which the payee had no legal right or power to settle (*Bryan* v. *Philpot*, 3 Ired. L. 469; *Sowles* v. *Sowles*, 10 Vt. 181); or, indeed, any fact that shows that there was no consideration in fact, either as to the whole or a part of the contract (*Earl* v. *Page*, 6 N. H. 477; *Bean* v. *Jones*, 8 id. 149; *Harper* v. *Columbus*, 35 Ala. 127; *Hamilton* v. *Conyers*, 28 Ga. 276); and this may be done by showing that the payee fraudulently misrepresented the quality, quantity, or efficiency of the property purchased, and that it is in fact wholly worthless, or worth much less than was agreed to be paid therefor. *Hamilton* v. *Conyers*, 28 Ga. 276; *Earl* v. *Page*, 6 N. H. 477.

# CHAPTER XII.

## CONTRIBUTORY NEGLIGENCE.

### ARTICLE I.

#### CONSIDERED AS A DEFENSE.

**Section 1. In general.** In all cases, where a person seeks to recover of another by reason of that other's negligence, it is a full and ample defense to the action, to show that the plaintiff was himself guilty of negligence that contributed to the injury. See Vol. 5, p. 718. This is upon the principle that a person cannot profit by his own wrong, even though the person sought to be charged with the consequences was equally, or even more, in the wrong than the plaintiff. *Macon, etc., R. R. Co.* v. *Winn*, 19 Ga. 440; *Haley* v. *Chicago, etc., R. R. Co.*, 21 Iowa, 15; *Haley* v. *Earle*, 30 N. Y. (3 Tiff.) 208; *Michigan, etc., R. R. Co.* v. *Leahey*, 10 Mich. 193; *Gonzales* v. *N. Y. & Harlem R. R. Co.*, 38 N. Y. (11 Tiff.) 440; *Dix* v. *Brown*, 41 Miss. 131; *Neal* v. *Gillett*, 23 Conn. 437; *Mayer* v. *Pacific R. R. Co.*, 40 Mo. 151; *Ashmore* v. *Penn. Steam Towing, etc., Co.*, 28 N. J. 180; *Northern, etc., R. R. Co.* v. *State*, 29 Md. 420; *Earhart* v. *Youngblood*, 27 Penn. St. 331; *Noyes* v. *Morristown*, 1 Vt. 353; *Toledo, etc., R. R. Co.* v. *Goddard*, 25 Ind. 185; *Chicago, etc., R. R. Co.* v. *Cauffman*, 28 Ill. 513; *Kellogg* v. *T. D. Hine*, 19 La. Ann. 304; *Fallon* v. *Boston*, 3 Allen, 38; *Murch* v. *Concord, etc., R. R. Co.*, 29 N. H. 9; *Wood* v. *Mears*, 12 Ind. 515.

The rule may be said to be, that a person cannot recover for an injury received by reason of the negligence of another, if his own want of care directly contributed to the injury, for, where one rushes upon danger, which might have been avoided by the exercise of ordinary care upon his part, he cannot complain because others have failed to exercise a greater degree of care than he did. But, in order to shield the other from liability, the person injured must have not only been negligent, but his negligence must have been *the proximate cause* of the injury. He must, by his own want of care, have *directly contributed* to the injury. That is, by his own want of ordinary care, he must have done that which has directly brought it about, and thus have placed himself or his property in a position, where, except for

his co-operating fault, no injury would have been sustained, and his act must also have been such as a man of ordinary prudence would not have done, in view of the circumstances. Otherwise, he cannot be charged with that degree of negligence which operates to excuse the other from the consequences of his fault. *Lindsey* v. *Danville*, 45 Vt. 72; *Folsom* v. *Underhill*, 36 id. 580; *Stiles* v. *Geesey*, 71 Penn. St. 439; *Hackett* v. *Middlesex Manuf. Co.*, 101 Mass. 101; *Toledo, etc., R. R. Co.* v. *Pindar*, 53 Ill. 447; 5 Am. Rep. 57; *Cleveland, etc., R. R. Co.* v. *Elliott*, 28 Ohio St. 340; *Johnson* v. *Canal, etc., R. R. Co.*, 27 La. Ann. 53; *Herrick* v. *Sullivan*, 120 Mass. 576; *Hammond* v. *Muskwa*, 40 Wis. 35; *Illinois, etc., R. R. Co.* v. *Cragin*, 71 Ill. 177; *Kansas Pacific R. R. Co.* v. *Brady*, 17 Kans. 380; *Robinson* v. *N. Y. Central R. R. Co.*, 66 N. Y. (21 Sick.) 11; 23 Am. Rep. 1.

To operate as a defense, the plaintiff's negligence must have *proximately* contributed to the injury. If the negligence of the defendant was the *proximate*, and that of the plaintiff the *remote* cause of the injury, an action will lie, although the plaintiff was not entirely free from fault. The fact that the plaintiff is guilty of negligence does not relieve the defendant from using all reasonable care to prevent an injury to him or his property, and, if he inflicts a willful injury, or neglects to use reasonable care to prevent it, he cannot set up the plaintiff's negligence as a bar to a recovery therefor. *Chicago, etc., R. R. Co.* v. *Donahue*, 75 Ill. 106; *Mississippi, etc., R. R. Co.* v. *Mason*, 51 Miss. 234; *Cleveland, etc., R. R. Co.* v. *Elliott*, 28 Ohio St. 340; *Litchfield Coal Co.* v. *Taylor*, 81 Ill. 590; *Green* v. *Erie R. R. Co.*, 11 Hun (N. Y.), 333. The question as to whether the plaintiff was guilty of contributive negligence in a given case is, in all cases, one for the jury to determine, where there is any conflict of evidence upon that point (*Filer* v. *N. Y. Central R. R. Co.*, 49 N. Y. [4 Sick.] 47; 10 Am. Rep. 327; *Greenleaf* v. *Ill. Cent. R. R. Co.*, 29 Iowa, 14; 4 Am. Rep. 181; *Herrick* v. *Sullivan*, 120 Mass. 576), and is to be solved according to the circumstances attendant upon the transaction. *Penn. Canal Co.* v. *Bentley*, 66 Penn. St. 30; *Haight* v. *N. Y. Cent. R. R. Co.*, 7 Lans. 11; *Jenkins* v. *Little Miami R. R. Co.*, 2 Dis. (Ohio) 49; *Newhouse* v. *Miller*, 35 Ind. 436; *Devitt* v. *Pacific R. R. Co.*, 50 Mo. 302; *Smith* v. *Union R. R. Co.*, 61 Mo. 588; *Mowrey* v. *Central City R. R. Co.*, 66 Barb. 43; *Manly* v. *Wilmington, etc., R. R. Co.*, 74 N. C. 655; *Sheehy* v. *Burger*, 62 N. Y. 558. But, where the facts are not disputed, or where, from the plaintiff's own evidence, it appears that he was guilty of contributive negligence, the question is one of law for

the court, and the plaintiff may be nonsuited, or a verdict for the defendant directed (*Hoyt* v. *City of Hudson*, 41 Wis. 105; 22 Am. Rep. 714; *Frech* v. *Philadelphia, etc., R. R. Co.*, 39 Md. 574; *Baltimore, etc., R. R. Co.* v. *Boteler*, 38 id. 568); but, where the facts are disputed, and the evidence is conflicting, the case cannot be withdrawn from the jury. *Delancy* v. *Milwaukee, etc., R. R. Co.*, 33 Wis. 67; *Gagg* v. *Vetter*, 41 Ind. 228; 13 Am. Rep. 322.

Thus, in an action against a railroad company for injuries from a fire ignited by sparks from a locomotive, the defendant requested the court to instruct the jury, that, if the plaintiff omitted to take certain precautions to prevent fire thus ignited from communicating with his property, he was guilty of negligence, it was held that the instruction was properly refused, for the reason that it undertook to decide for the jury that certain acts or omissions would constitute negligence, where the question as to whether such acts or omissions amounted to negligence on the plaintiff's part in a particular case, is for the jury in view of all the circumstances. *Garrett* v. *Chicago, etc., R. R. Co.*, 36 Iowa, 121. In another case where the plaintiff was employed to haul materials from a house, and found the approach thereto obstructed by a pile of stones and rubbish, extending along the street in front of the house and for some distance on either side, which had been left there by contractors employed by the defendant in laying water mains, and the plaintiff attempted to lead his horse, with the cart attached, across the ridge up to the sidewalk, and while so doing, the horse stumbled and falling upon the plaintiff broke his leg; the court held that the question, whether the plaintiff was guilty of negligence in attempting to lead his horse over the ridge, was properly submitted to the jury, and that their finding was conclusive. *Mayor, etc.* v. *Holmes*, 39 Md. 243. In a New York case, in an action brought to recover for injuries resulting from the defendant's negligence, the plaintiff's evidence tended to show that she was standing at the corner of two streets in the city of Brooklyn, when a cart belonging to the defendant, loaded with lumber, was passing just as she stepped off from the sidewalk to cross the street, when some planks dragging behind it swept around, and striking her, inflicted the injuries complained of. The court nonsuited the plaintiff upon the ground that she was guilty of contributory negligence, but the court of appeals set aside the nonsuit, holding that the question whether the plaintiff's failure to observe such an unusual appendage to the cart, and to calculate the sweep that it would make, in turning the corner, was evidence of negligence on her part, was for the jury, and was not, as a matter of law, such conclusive evidence of negligence on her part as warranted the court in directing a nonsuit.

*Sheehy* v. *Burger*, 62 N. Y. (22 Sick.) 558. "Her failure," says RAPALLO, J., "to observe the rather unusual appendage to the cart, and to calculate the sweep that it would make in turning the corner, can hardly be held, as a matter of law, to be conclusive evidence of negligence on her part. That the turning of the truck might have the effect of causing the plank to sweep the sidewalk was known to the driver, but might have been, and probably was, unknown to the plaintiff. No warning was given her, and it was for the jury to say, under all the circumstances, whether she had sufficient knowledge or means of knowledge of the probable effect of the turning of the truck, to render it negligent on her part to fail to avoid the danger." See, also, *Ernst* v. *Hudson R. R. R. Co.*, 35 N. Y. 28; *Hackford* v. *N. Y. Cent. R. R. Co.*, 53 id. 654.

Thus it will be seen that, in order to render the question of contributive negligence one of law, the evidence to establish it must be conclusive, and unless it is entirely clear, the question should be submitted to the jury. *Brown* v. *New York; Hunt* v. *Lowell Gas-light Co.*, 1 Allen, 343; *Oakland R. R. Co.* v. *Fielding*, 48 Penn. St. 320; *Nichols* v. *Sixth Av. R. R. Co.*, 38 N. Y. 131; *Lawrence* v. *Housatonic R. R. Co.*, 29 Conn. 390; *Fallon* v. *The Central Park, etc., R. R. Co.*, 64 N. Y. 13; *Mangam* v. *The Brooklyn R. R. Co.*, 38 id. 455. In the case last cited the action was for an injury inflicted upon a child, who was alone in the public street. The child escaped, unknown to its parents, through a window left open. The court held that the jury must say whether proper care was or was not exercised by the parents. So, in *Fallon* v. *Cent. Park, etc., R. R. Co.*, 64 N. Y. (24 Sick.) 13, which was also an action to recover for injuries to a young child inflicted while it was unattended in the public street, it appeared that the plaintiff came in from the back yard, where he had been at play, and asked his mother for a drink of milk, which she gave him. While he was drinking it his mother went into another room to change her dress, telling him to go back into the back yard. Instead of doing so, however, he went down the stairs and out of the door, which was open, into the street, where he was knocked down by the horses attached to one of the defendants' cars, and severely injured. The court held that the question was for the jury whether the plaintiff's parents were guilty of negligence contributing to the injury. In determining the question, the jury are to consider all the circumstances, and if, from the whole evidence, they are satisfied that the injury would not have been inflicted except for the negligence of the plaintiff, no recovery can be had. The fact that the defendant was more negligent than the plaintiff will not render him liable. In order to make him responsible, it must appear

that his negligence was the proximate, while that of the plaintiff was but the remote cause of the injury. By this, it is not to be understood that, in order to defeat a recovery, the plaintiff must be shown to have been, in any measure, *the cause* of the act through which the injury arose; but, if he might, by the exercise of ordinary care, have averted the injury, he is treated as having contributed thereto to such an extent as to defeat his right of recovery. *Colegrove* v. *N. Y. & N. H. R. R. Co.*, 20 N. Y. 492; *Sherman* v. *Fall River Iron Works*, 2 Allen, 524; *Hoben* v. *Burlington, etc., R. R. Co.*, 20 Iowa, 562; *Bigelow* v. *Reed*, 51 Me. 325. But it must be remembered that a distinction exists between an act of the plaintiff that contributes to the original injury and an act subsequent thereto, that merely aggravates or increases it. In such a case, a recovery may be had for such damages as arose from the injuries to which he did not contribute, but, at the point where his negligence intervened and operated to aggravate the injury, his right of recovery ceases; for from that time he is treated as contributing to the injury (*Wright* v. *Illinois, etc., Tel. Co.*, 20 Iowa, 195; *Sherman* v. *Fall River Iron Works Co.*, 2 Allen, 524); and his conduct operates to that extent as a defense. *Chase* v. *N. Y. Cent. R. R. Co.*, 24 Barb. 273; *Hunt* v. *Lowell Gas-light Co.*, 1 Allen, 343; *Thomas* v. *Kenyon*, 1 Daly (N. Y.), 132. See Vol. 4, pp. 718 *et seq.*

§ 2. **When a sufficient defense.** We have already stated the general rule applicable to the defense of contributory negligence, and it is not necessary to repeat it. From what has already been stated, it will be seen that it is always a good defense to an action for injuries resulting from the negligence of another, that, except for the plaintiff's own negligence or want of care, the injury would not have occurred. Thus, if parents permit their young children to stray alone in the public streets and they are injured by a passing train, or by a team being driven along it, damages cannot be recovered by them therefor, although negligence is shown in the management of the train or team on the part of the defendant or his servants. *Callahan* v. *Bean*, 9 Allen, 401; *Mangam* v. *Brooklyn R. R. Co.*, 36 Barb. 230; *Chicago* v. *Starr*, 42 Ill. 174; *Lumsden* v. *Russell*, Hay, 238; *Hartfield* v. *Roper*, 21 Wend. 615. But, when the action is in the name and on behalf of the child, the negligence of the parents is not imputable to it, and a recovery may be had, if the defendant, by the exercise of ordinary care, could have prevented the injury (*Government Street R. R. Co.* v. *Hanlon*, 53 Ala. 70; *Baltimore, etc., R. R. Co.* v. *McDonnell*, 43 Md. 534; *Robinson* v. *Cone*, 22 Vt. 213; *R. R. Co.* v. *Gregory*, 52 Ill. 226; *Norfolk, etc., R. R. Co.* v. *Ormsby*, 27 Gratt. 455; *McGarry* v. *Loomis*, 63 N. Y. [23 Sick.] 104; 20 Am. Rep. 570; *Chicago, etc., R. R. Co.* v. *Becker*, 76 Ill. 25;

Vol. 4, p. 722); or, if the injury was willfully inflicted. *Jeffersonville, etc., R. R. Co.* v. *Bowen*, 40 Ind. 545. See Vol. 4, p. 721. The rule seems now to be well established by the preponderance of authority in this country, that the degree of caution required of a child is to be measured by its maturity and capacity, and that a different rule prevails in reference to the negligence of adults and of children of tender years. An adult is bound to exercise such care and caution as is ordinarily exercised by persons of ordinary intelligence and discretion under similar circumstances. But the degree of care required of a child is made to depend upon its age and knowledge. *McGarry* v. *Loomis*, 63 N. Y. (23 Sick.) 104; 20 Am. Rep. 570; *Chicago, etc., R. R. Co.* v. *Murray*, 71 Ill. 601; *Government St. R. R. Co.* v. *Hanlon*, 53 Ala. 70; *Hydraulic Works Co.* v. *Orr*, 83 Penn. St. 332; *Baltimore, etc., R. R. Co.* v. *McDonnell*, 43 Md. 534; *Walters* v. *C., R. I., etc., R. R. Co.*, 41 Iowa, 71; *Thurbur* v. *Harlem Bridge, etc., R. R. Co.*, 60 N. Y. (15 Sick.) 326; *Chicago, etc., R. R. Co.* v. *Becker*, 76 Ill. 26; *Pittsburgh, etc., R. R. Co.* v. *Pearson*, 72 Penn. St. 169; *Railroad Co.* v. *Stout*, 17 Wall. 657; *East Saginaw City R. R. Co.* v. *Bohn*, 27 Mich. 503; *Louisville, etc., Canal Co.* v. *Murphy*, 9 Bush (Ky.), 522.

When the act of the plaintiff was imprudent, he cannot claim damages from another, who has injured him or his property by his negligent conduct. Domat very tersely states the rule thus: "If," says he, "any one goes across a public cricket ground whilst people are playing there, and the ball being struck, chances to hurt him, the injury is to be imputed to the imprudence of the person who sought out the danger, and not to the innocent striker of the ball." In accordance with this rule, it will be seen that, in all cases where the danger is obvious, and such as a prudent man would not, under the circumstances, incur, no recovery can be had even though the defendant was guilty of negligence. Therefore when two persons driving in opposite directions upon a highway, by reason of the negligence of both, bring their carriages into collision, neither can recover from the other for the damages resulting therefrom (*Schaabs* v. *Woodburn Severn Wheel Co.*, 56 Mo. 173); and it does not aid the plaintiff, that the defendant was driving upon the wrong side of the highway, if he had ample time and opportunity to change his course, because no person has a right to rush upon danger with his eyes open, and charge the consequences upon another who created the danger. Thus, if A places an obstruction in a highway, which is, or might by the exercise of proper care have been seen by a person driving along it, he cannot recover of A if he drives against it and is injured, when by proper care he might have avoided it. *Butterfield* v. *Forrester*, 11 East, 60.

"A party," said Lord ELLENBOROUGH, in the case last cited, "is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered the wrong side of a highway, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself." *Cunningham* v. *Lyness*, 22 Wis. 245; *Folsom* v. *Underhill*, 36 Vt. 580. The mere fact that the defendant knew, or might have known, that there was danger of injury in doing the act, in the doing of which an injury was received, is not of itself sufficient to excuse the person, through whose fault it arose, from liability. The amount of danger and the circumstances which led the plaintiff to incur it are to be considered by the jury in determining whether or not he was or was not in the exercise of ordinary care and prudence. This rule was well illustrated in an English case. *Clayards* v. *Dethick*, 12 Q. B. 439. In that case the commissioners of sewers had made a dangerous trench in the only outlet from a mew, putting up no fence and having only a narrow passage, on which they heaped rubbish; and a cabman, in the exercise of his calling, attempted to lead his horse out over the rubbish, and while so doing, the horse fell and was killed. The court held that a recovery could not be defeated because he had, at some hazard, created by the defendants, brought his horse out of the stable.

"The question is," said COLERIDGE, J., "not only whether the defendants did an improper act, but also, whether the injury to the plaintiff may properly be deemed the consequence of it. The defendants say that that injury was the result of his own wrongheadedness in attempting to pass when he was told that it could not be done without risk to his horses, and to the mew below. * * * The lord chief justice put the question in the manner which appears correct, by asking, namely, whether the plaintiff acted as a man of ordinary prudence would have done, or rashly, and in defiance of warning. *The plaintiff was not bound to abstain from pursuing his livehood because there was some danger.* It was necessary for the defendant to show *a clear danger*, and a precise warning." But, when the danger is obvious, and the risk of incurring it is such as a man of ordinary prudence would not incur, it is a complete answer to an action for damages. *Owings* v. *Jones*, 9 Md. 108; *Clayards* v. *Dethick*, 12 Q. B. 439; *Garmon* v. *Bangor*, 38 Me. 443. Thus, where the plaintiff brought an action for injuries sustained by a defect in a bridge, the defense interposed was, that the plaintiff was guilty of negligence in going upon the bridge in its defective condition, and the court held that his conduct in going upon the

bridge must have been that of a prudent and careful man, and that if he had reasonable ground to apprehend that the bridge was unsafe, he could not recover. *Folsom* v. *Underhill*, 36 Vt. 580. See, also, *Wyatt* v. *Great Western R. R. Co.*, 34 L. J. Q. B. 204.

Every person is bound to exercise due care and caution in every thing he does, and the degree of caution to be exercised is to be measured in view of the extent of the danger to be avoided. Thus, a person in crossing a railroad, either on foot or with a team, is bound to look and listen for an approaching train, and is not permitted to rely exclusively upon the railroad company giving the signals required by statute, and failing to take such precautions, he is precluded from a recovery, even though the company failed in the performance of its statutory duty. He is bound to use such prudence as is commensurate with the nature of the risk, and if he has an unobstructed view for a long distance up and down the track, he is bound to look to see whether a train is approaching, and if the track is so constructed that he can see it for only a short distance, he is bound *to look and listen* for an approaching train, and where, by the exercise of these senses, he might have avoided the injury, no recovery can be had. No man has a right to rely upon the care and prudence of others, but must exercise due care himself to prevent injury from the lack of prudence in others. *Rothe* v. *Milwaukee*, 21 Wis. 256; *Chaffee* v. *Boston, etc., R. R. Co.*, 104 Mass. 108; *Artz* v. *Chicago, etc., R. R. Co.*, 34 Iowa, 153; *Gorton* v. *Erie R. R. Co.*, 45 N. Y. 660; *Illinois, etc., R. R. Co.* v. *Buches*, 55 Ill. 379; *Dodge* v. *R. R. Co.*, 34 Iowa, 279; *Hanover R. R. Co.* v. *Coyle*, 55 Penn. St. 396; *Central R. R. Co.* v. *Dixon*, 42 Ga. 327; *Cleveland, etc., R. R. Co.* v. *Terry*, 8 Ohio St. 570; *Wheelock* v. *Boston, etc., R. R. Co.*, 105 Mass. 203; *Poole* v. *N. Carolina R. R. Co.*, 8 Jones, 340. And see Vol. 4, p. 688. In *Steves* v. *Oswego, etc., R. R. Co.*, 18 N. Y. (4 Smith) 422, the plaintiff, having an opportunity to see the track for a long distance either way, drove upon the crossing without looking to see whether there was a train in sight, and was injured by the engine. The court held that no recovery could be had as the plaintiff did not exercise common and ordinary prudence in driving upon the track. The court says: "Ordinary regard for his own safety would have prompted him, as he approached the crossing, to see, as he might well have done, whether the cars were not also approaching. It is obvious that a single look would have saved him from the disaster with which he met. * * That the plaintiff should have omitted to look was the extreme of carelessness. Such carelessness is entirely inconsistent with a right to recover damages founded upon the negligence of the defendants. The plaintiff was himself the author of his own injury." See,

also, to same effect, *Wilds* v. *Hudson R. R. Co.*, 24 N. Y. 430; *Baxter* v. *Troy & Boston R. R. Co.*, 41 id. 502; *Wilcox* v. *Rome, etc., R. R. Co.*, 39 id. 358; *Nicholson* v. *Erie R. R. Co.*, 41 id. 525; *Central R. R. Co.* v. *Dixon*, 42 Ga. 327; *Rothe* v. *Milwaukee, etc., R. R. Co.*, 21 Wis. 256. A traveler must use his eyes and ears as a prudent man, and cannot recover for a failure to do so. *Stubley* v. *L. & N. Railway*, L. R., 1 Exch. 13; *Baxter* v. *Troy & Boston R. R. Co.*, 41 N. Y (2 Hand) 502; *Nicholson* v. *Erie, etc., R. R. Co.*, id. 525. But if the company has made erections, or left cars in such a position as to obstruct the view of the track in one direction, he will be excused from looking in *that* direction. He is only bound to look, when, by so doing, he would be aided in determining whether a train is approaching; in all other respects, he is entitled to rely upon his sense of hearing. *McGuire* v. *Hudson R. R. Co.*, 2 Daly [N. Y.], 76; *James* v. *Gt. Western Railway Co.*, L. R., 2 C. P. 634 *n*. But, where the proper signals are given, if a traveler ventures upon the track, thinking that he has ample time to do so before the train reaches the crossing, but miscalculates his chances and is injured, the risk will be his own, and no recovery can be had therefor, unless the company was otherwise guilty of negligence that caused the injury (*Van Schaick* v. *Hudson R. R. Co.*, 43 N. Y. [4 Hand] 527; *Chicago, etc., R. R. Co.* v. *Fears*, 53 Ill. 115); as, if the rate of speed is fixed by law, and the train was running at a higher rate (*Madison, etc., R. R. Co.* v. *Taffe*, 37 Ind. 364); or if the train was being run at a much greater speed than usual. *Richardson* v. *N. Y. Cent. R. R. Co.*, 45 N. Y. (6 Hand) 846; *Detroit, etc., R. R. Co.* v. *Van Steinburg*, 17 Mich. 99. The fact that the company did not ring the bell or blow the whistle as required by law will not excuse the plaintiff from looking and listening, but under such circumstances a less degree of diligence is required. *Gorton* v. *Erie R. R. Co.*, 45 N. Y. 660; *Spencer* v. *Ill. Cent. R. R. Co.*, 29 Iowa, 55; *Havens* v. *Erie R. R. Co.*, 41 N. Y. 296.

A person who attempts to travel upon a railroad track has no claim upon the company for injuries for being run upon by its engines or trains (*Harty* v. *Cent. R. R. Co. of N. J.*, 42 N. Y. 468); unless there is ample opportunity to stop the train, which is not done, when it is evident that the trespasser does not see or know of the train's approach, in which case it is a question for the jury whether the defendant was in the exercise of proper care. *Toledo, etc., R. R. Co.* v. *Riley*, 47 Ill. 514; *Stout* v. *Sioux City R. R. Co.*, 2 Dill. (C. C.) 294; *Brown* v. *Hannibal, etc., R. R. Co.*, 50 Mo. 461; 11 Am. Rep. 420. In the case of a foot passenger crossing a railroad track either upon a highway or over a private way, he is bound to the same degree of vigilance as a traveler with

a team, and the same rules apply to either. *Beisiegel* v. *N. Y. Cent. R. R. Co.*, 34 N. Y. (7 Tiff.) 633.

A passenger upon either steam or horse cars, or other vehicles who voluntarily, and without cause, exposes himself to danger, cannot recover for injuries sustained by reason of such exposure; as if any passenger attempts to get on or off a car when it is in motion (*Burrows* v. *Erie R. R. Co.*, 63 N. Y. [18 Sick.] 556); and this seems to be the rule, even though the train has stopped, but started again before the passenger could alight. Id. And the fact that the passenger is being carried by the station at which he wishes to alight, will not excuse his act. *Mettlestadt* v. *Ninth Av. R. R. Co.*, 4 Robt. (N. Y.) 377; S. C., 32 How. 428; *Jeffersonville R. R. Co.* v. *Hendricks*, 26 Ind. 228. But if a train is moving slowly, and the conductor advises or directs the passenger to get out, the rule is otherwise. *McIntyre* v. *N. Y. Cent. R. R. Co.*, 37 N. Y. 287; *Penn. R. R. Co.* v. *McCloskey*, 23 Penn. St. 529; *Filer* v. *N. Y. Cent. R. R. Co.*, 49 N. Y. 47. But, if the car is in rapid motion, or the circumstances are such as to indicate that it is dangerous to alight, neither the advice or direction of the conductor will justify the act. *Ginnon* v. *N. Y. & Harlem R. R. Co.*, 3 Robt. (N. Y.) 25; *Penn. R. R. Co.* v. *Aspell*, 23 Penn. St. 147. If, however, a passenger under a reasonable apprehension of danger, jumps from a car or other vehicle when in motion, and is injured, his act is not such negligence as will prevent a recovery; but, in order to excuse the act, the plaintiff is required to show that the danger was imminent and such as would create apprehension of injury in the mind of a person of reasonable prudence. Passengers under the influence of reasonable fear are not expected or required to exercise that degree of caution or prudence which a person would exercise under ordinary circumstances. *Galena R. R. Co.* v. *Yarwood*, 17 Ill. 509; *Frink* v. *Potter*, id. 406; *Buel* v. *N. Y. Cent. R. R. Co.*, 31 N. Y. 314.

If a person attempts to alight from a train at a dangerous place, other than the station, no recovery can be had for injuries sustained, unless he was directed to alight there by the defendant's employees. *Foy* v. *London, etc., R. R. Co.*, 18 C. B. (N. S.) 225; *Siner* v. *Great Western, etc., R. R. Co.*, L. R., 3 Exch. 150; *Bridges* v. *No. London R. R. Co.*, L. R., 6 Q. B. 377; *Pennsylvania R. R. Co.* v. *Aspell*, 23 Penn. St. 147; *Davis* v. *Chicago, etc., R. R. Co.*, 18 Wis. 175; *Mulhado* v. *Brooklyn City R. R. Co.*, 30 N. Y. 370; *Ohio, etc., R. R. Co.* v. *Schiebe*, 44 Ill. 470. If a person unnecessarily or carelessly exposes himself to injury, as by putting his arm out of a car window when the train is in motion, whereby it is broken, he cannot recover for the injury, even though it was broken by coming in contact with a

car negligently left standing upon a side track. *Pittsburgh & Connellsville R. R. Co.* v. *Andrews*, 39 Md. 329; S. C., 17 Am. Rep. 568; *Todd* v. *Old Colony R. R. Co.*, 3 Allen, 18. But it seems that the right of recovery in such cases will depend upon the circumstances (*The Pittsburgh & Connellsville R. R. Co.* v. *McClurg*, 56 Penn. St. 294; *Indianapolis, etc., R. R. Co.* v. *Rutherford*, 29 Ind. 82; *Louisville, etc., R. R. Co.* v. *Sickings*, 5 Bush [Ky.], 1), and in some of the States it has been held that, if the company fails to provide guards against the exposure of a person's elbows or person from a window, it is to be regarded as negligence *per se* on the part of the company, and that the question, as to whether the plaintiff was negligent in exposing his person in the window or not, is for the jury. *N. J. R. R. Co.* v. *Kennard*, 21 Penn. St. 203; *Holbrook* v. *The Utica, etc., R. R. Co.*, 12 N. Y. 236; *Chicago, etc., R. R. Co.* v. *Pondrom*, 51 Ill. 333; S. C., 2 Am. Rep. 306; *Spencer* v. *Milwaukee, etc., R. R. Co.*, 17 Wis. 487. But there would seem to be little doubt that the rule as held in Massachusetts and Maryland accords better with the principles of strict justice, and with the rules generally applicable in actions of this character. In *Eppendorf* v. *Brooklyn City, etc., R. R. Co.*, 69 N. Y. (24 Sick.) 195, it is held that it is not under all circumstances negligence, as matter of law, for a person to get upon a street car while in motion. In exceptional cases, where the conditions are unfavorable, it may be so, but ordinarily it is a question of fact for the jury. See, also, *Phillips* v. *Rensselaer, etc., R. R. Co.*, 49 N. Y. (4 Sick.) 177.

When a person is injured by reason of defects in a highway, he cannot recover if his own want of care contributed to the injury. Thus, in an action to recover for personal injuries sustained by a person while driving along a defective highway, by reason of the breaking down of a wagon which had previously, and by another defect in the road during the same journey, to the knowledge of the plaintiff, been considerably strained and weakened, it was held that no recovery could be had, because the breaking down of the wagon, and the consequent injury to the plaintiff, had been in part caused by him, by proceeding upon his journey after he knew that the wagon had been weakened by the first injury. *Jenks* v. *Wilbraham*, 11 Gray, 142.

The duty of the town to the traveling public does not extend to the length of keeping its highways in such a condition that no injury can possibly happen. While a proper degree of care is required from the town, so upon the other hand at least *ordinary care* is required from the traveler. He cannot shut his eyes against apparent dangers, and drive recklessly along a highway. He is bound to keep his eyes open and maintain a proper degree of watchfulness against danger. *Hubbard*

v. *Concord*, 35 N. H. 52; *Rathburn* v. *Payne*, 19 Wend. 399; *Wilson* v. *Charlestown*, 8 Allen, 137; *Cotton* v. *Wood*, 8 C. B. (N. S.) 568; *Raymond* v. *Lowell*, 6 Cush. 524. He cannot, with impunity, drive into or over a dangerous place in a highway simply because he cannot pass without doing so; neither can he drive against an obstruction, because it happens to be in the highway. *Raymond* v. *Lowell*, 6 Cush. 524. It is only against *accidents* that result to a traveler upon a highway, while he is in the exercise of reasonable care, that the town is bound to indemnify him (*Smith* v. *Lowell*, 6 Allen, 39; *Hanlon* v. *Keokuk*, 7 Iowa, 488; *Barker* v. *Savage*, 45 N. Y. [6 Hand] 191; *Brown* v. *Jefferson*, 16 Iowa, 339; *Hyde* v. *Jamaica*, 27 Vt. 460; *Hubbard* v. *Concord*, 35 N. H. 52); and generally it is a question for the jury whether the plaintiff was, at the time of receiving the injury, in the exercise of proper care. But, when the facts are uncontroverted, the court may determine the question. *Jenks* v. *Wilbraham*, 11 Gray, 142. A person who is partially blind, or is troubled with defective vision, is not necessarily guilty of negligence because he travels unattended in the public street, but he is bound to proceed with due caution, in view of his infirmity, and if he is injured by defects in the highway, when, except for them, he would not have been injured, it is always, in such cases, a question of fact for the jury whether the plaintiff had sight enough to go unattended upon the street, with a reasonable assurance of safety (*Davenport* v. *Ruckman*, 37 N. Y. 568); and the same rule prevails as to persons intoxicated. *Robinson* v. *Pioche*, 5 Cal. 460; *Stuart* v. *Machias*, 48 Me. 477.

Where a person seeks to recover of another for injuries resulting from a collision in a highway, it is a good defense to show that the plaintiff was himself guilty of contributive negligence. Thus, where a horse, harnessed to a cart, was left standing on the edge of a pier, with the bits out of his mouth, at an hour when the pier was crowded with vehicles, it was held that, although room enough was left for a single vehicle to pass, yet the plaintiff could not recover of a person whose vehicle, in passing the plaintiff's team, hit it and pushed it into the water. *Morris* v. *Phelps*, 2 Hilt. (N. Y.) 38. So, where the plaintiff's horses and carriage were standing at a hack stand, and the driver was standing at the carriage door reading a newspaper, and the defendant's snow-plough in passing threw mud and snow into the carriage, frightening the horses so that they ran away and were injured, it was held that no recovery could be had, because the plaintiff was guilty of negligence in leaving his horses unattended in the public street. *Gray* v. *Second Av. R. R. Co.*, 65 N. Y. 561. See, also, S. P. *Cunningham* v. *Lyness*, 22 Wis. 245.

In an action against a railroad company for running over and killing cattle, it is a good defense that the owner permitted them to be at large in the highway near the track, or that they escaped upon the track through the insufficiency of the plaintiff's fence. *Hance* v. *Cayuga & Susquehanna R. R. Co.*, 26 N. Y. 428; *Munger* v. *Tonawanda R. R. Co.*, 4 N. Y. 349. Without stopping to enumerate the numberless instances in which the negligence of the plaintiff will debar a recovery by him, it will be seen from the preceding statements and illustrations that no recovery can be had where the plaintiff's negligence in any degree contributed to the injury, unless the defendant, being aware of the plaintiff's danger, and having the means or opportunity to avert it, fails to use ordinary caution to do so. *Davies* v. *Mann*, 10 M. & W. 546; *Trow* v. *Vt. Cent. R. R. Co.*, 24 Vt. 487; *Button* v. *Hudson R. R. Co.*, 18 N. Y. 248. Thus, if an engineer of a railway train sees a person or an animal on the track in season so that he can, without danger to the train, check its speed and avoid a collision with it, he is bound to do so, and failing in that respect, the company is chargeable for the injury inflicted. This is upon the principle that one person is not justified in neglecting to use proper precautions to prevent injury to another, or his property, simply because he was negligent. Both parties are held to the use of reasonable diligence. *Chicago & R. I. R. R. Co.* v. *Still*, 19 Ill. 499; *Chicago, etc., R. R. Co.* v. *Hogarth*, 38 id. 370; *Kerwhacker* v. *Cleveland, etc., R. R. Co.*, 3 Ohio St. 172. If the plaintiff voluntarily incurred danger, so great that no sensible person would have incurred it, in the absence of negligence on the part of the defendant that exhibits a design or intention to injure him, he will be precluded from a recovery. But a person who is guilty of negligence that produces injury to another cannot set up as a defense that part of the mischief would not have arisen if the person injured had not himself been guilty of *some* negligence.

The degree of negligence on the part of the plaintiff that must exist in order to excuse the defendant must be such as directly contributed to the injury. *Greenland* v. *Chaplin*, 5 Exch. 246. And if the defendant, by the exercise of due care, could have averted the injury, notwithstanding the plaintiff's negligence, he is bound to do so, and is responsible for any damages that result from his failure in that respect. *Raisin* v. *Mitchell*, 9 C. & P. 613; *Sills* v. *Brown*, 9 C. & P. 601; *Bridge* v. *Grand Junction R. R. Co.*, 3 M. & W. 244; *Davies* v. *Mann*, 10 id. 546. See Vol. 4, tit. *Negligence*.

§ 3. **When not a defense.** As has been previously stated, it is not every want of care on the plaintiff's part that will preclude him from a recovery for an injury received through the negligence of another. In

order to have that effect, the plaintiff must have failed in his ordinary duty under the circumstances. That is, he must have failed to exercise that degree of care that it was incumbent upon him to exercise under the circumstances, and his failure in that respect must have directly tended to produce the injury complained of. *Sills* v. *Brown*, 9 C. & P. 601. In the language of Lord ABINGER, C. B., in *Bridge* v. *Grand Junction Railway Co.*, 3 M. & W. 247, "the negligence of the plaintiff, in order to preclude him from a recovery, must be such that he could by ordinary care have avoided the consequences of the defendant's negligence" (*Beers* v. *Housatonic R. R. Co.*, 19 Conn. 566; *Colgrove* v. *New Haven R. R. Co.*, 20 N. Y. 492; *Butterfield* v. *Forrester*, 11 East, 60; *Mariott* v. *Stanley*, 1 Scott's N. R. 392; *Sills* v. *Brown*, 9 C. & P. 601); and in determining this question, regard is to be had to the age and means of information on the plaintiff's part, and all the circumstances attendant upon the transaction (*Harrison* v. *Berkley*, 1 Strobh. 525); and the jury, from the facts, are to say whether the plaintiff *contributed* to the injury. *Bigelow* v. *Reed*, 51 Me. 325; *Wilds* v. *Hudson R. R. Co.*, 24 N. Y. 430; *Hoben* v. *Burlington, etc., R. R. Co.*, 20 Iowa, 562; *Brand* v. *Schenectady, etc., R. R. Co.*, 8 Barb. 368. The fact that the plaintiff's act was illegal will not debar him from a recovery. This was well illustrated in *Davies* v. *Mann*, 10 M. & W. 546. In that case it appeared that the plaintiff was the owner of an ass, which he turned into a public highway to graze, and while so grazing there, the defendant drove against it with his horses and knocking it down, his wagon ran over it and injured it so that it died. The ass was fettered at the time, which prevented it from getting out of the way of teams. The judge instructed the jury that, although the leaving of the ass fettered in the highway so that it could not get out of the way of teams might be illegal, still, if the proximate cause of the injury was the want of proper care on the part of the defendant's servant, and the injury might have been avoided by the exercise of ordinary care on his part, the plaintiff was entitled to recover, and this ruling was sustained in the court of exchequer. In a Massachusetts case the plaintiff's team was standing in the street in a manner prohibited by a city ordinance, and while so standing was run against and injured by the defendant's servant. The court held that a recovery could be had, the only fault on his part consisting in the violation of a city ordinance. *Steele* v. *Burkhardt*, 104 Mass. 59; S. C., 6 Am. Rep. 191; *Kearns* v. *Sowden*, 104 Mass. 63; *Moody* v. *Osgood*, 60 Barb. 644.

In *Spofford* v. *Harlow*, 3 Allen, 176, the plaintiff was held entitled to recover although his sleigh was on the wrong side of the road when

the injury was inflicted; and in *Welch* v. *Wesson*, 6 Gray, 505, the plaintiff was held entitled to recover for injuries inflicted while illegally trotting his horse. In *Baker* v. *Portland*, 58 Me. 199; S. C., 4 Am. Rep. 274, the plaintiff was injured while driving at a greater rate of speed than was permitted by an ordinance of the city, and the court held that this fact did not prevent a recovery. But, if the plaintiff's violation of the law constituted one of the efficient causes of the injury, the rule would be otherwise (*Heland* v. *Lowell*, 3 Allen, 407); for, as was said by the court in *Worcester* v. *Essex, etc., Bridge Co.*, 7 Gray, 459, "it is the established law that, when a plaintiff's own unlawful acts concur in causing the damage that he complains of, he cannot recover compensation for such damage." The fact, however, that the plaintiff was doing an illegal act at the time the injury was received may be shown as one of the elements to establish negligence on his part, but of itself, and standing alone, is insufficient. *Jones* v. *Andover*, 10 Allen, 20; *Spofford* v. *Harlow*, 3 id. 176.

Neither can a person as a matter of law be charged with such contributory negligence as will excuse the negligence of the defendant, while endeavoring to save the life of another person, and a recovery may be had in such cases, unless the conduct of the plaintiff was such as would constitute rashness in the judgment of prudent persons. Thus, where a person, while endeavoring to rescue a child from being run over by an approaching locomotive, was himself run over and injured so that he died, it was held a question for the jury whether, under the circumstances, he was guilty of rash or reckless conduct. "The law," said Grover, J., "has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence which will preclude a recovery; but where the exposure is to save life, it is not wrongful, and therefore not negligent, unless such as to be regarded as either rash or reckless. *Eckert* v. *Long Island R. R. Co.*, 43 N. Y. 502; S. C., 3 Am. Rep. 721. The fact that the plaintiff was intoxicated when the injury was received is not of itself evidence of a want of proper care on his part, and will not prevent a recovery unless it is shown to have contributed to the injury (*Robinson* v. *Pioche*, 5 Cal. 460; *Stuart* v. *Machias Port*, 48 Me. 477), but if he was so intoxicated as to be incapable of taking care of himself or of taking proper precautions to avoid the injury of which he complains, the rule is otherwise, and he is chargeable with contrib-

utive negligence. *Cramer* v. *Burlington*, 42 Iowa, 315; *Illinois, etc., R. R. Co.* v. *Cragin*, 71 id. 177.

In all cases where there is any conflict of evidence upon the question whether or not the plaintiff was guilty of negligence contributing to the injury, it must be submitted to the jury (*Willard* v. *Pinard*, 44 Vt. 34; *Schierhold* v. *North Beach, etc., R. R. Co.*, 40 Cal. 447; *Ditchett* v. *Spuyten Duyvil, etc., R. R. Co.*, 5 Hun [N. Y.], 165; *Sheehy* v. *Burger*, 62 N. Y. 558; *Barton* v. *St. Louis R. R. Co.*, 52 Mo. 253; 14 Am. Rep. 418; *Jetter* v. *N. Y. & Harlem R. R. Co.*, 2 Abb. N. Y. App. Dec. 458; *Baltimore, etc., R. R. Co.* v. *State*, 36 Md. 366; *Hoyt* v. *City of Hudson*, 41 Wis. 105; 22 Am. Rep. 714; *Herrick* v. *Sullivan*, 120 Mass. 576; *Kansas Pacific R. R. Co.* v. *Brady*, 17 Kans. 380; *Miss. Cent. R. R. Co.* v. *Mason*, 51 Miss. 234; *Robison* v. *Gary*, 28 Ohio St. 241; *Gilman* v. *Noyes*, 57 N. H. 627; *Kenworthy* v. *Ironton*, 41 Wis. 647), and the instances are rare in which the court will take the question from the jury. In order to warrant it in doing so, the evidence of the plaintiff's co-operating negligence must be clear, conclusive and unquestionable (*Fletcher* v. *Atlantic, etc., R. R. Co.*, 64 Mo. 484; *Kenworthy* v. *Ironton*, 41 Wis. 647), and it must also appear that his negligence proximately contributed to the injury. Where the defendant's negligence was the proximate, and that of the plaintiff only the remote cause of the injury, a recovery may be had although the plaintiff was not entirely free from fault. *Cleveland, etc., R. R. Co.* v. *Elliott*, 28 Ohio St. 340; *Miss. Cent. R. R. Co.* v. *Mason*, 51 Miss. 234; *Johnson* v. *Canal, etc., R. R. Co.*, 27 La. Ann. 53; *Manly* v. *Wilmington, etc., R. R. Co.*, 74 N. C. 655; *Green* v. *Erie R. R. Co.*, 11 Hun (N. Y.), 333. In *Illinois, Chicago, etc., R. R. Co.* v. *Triplett*, 38 Ill. 482, and *Wisconsin, Milwaukee, etc., R. R. Co.* v. *Hunter*, 11 Wis. 160, the doctrine of comparative negligence prevails. See Vol. 4, p. 718. But in most of the States this doctrine is repudiated. In all cases where the defendant's negligence was so gross as to imply a disregard of consequences, or a willingness to inflict the injury, the plaintiff may recover even though he was a trespasser, or did not use ordinary care (*Lafayette, etc., R. R. Co.* v. *Adams*, 26 Ind. 76); and where by the exercise of ordinary care he could not have averted the injury, he may recover even though he was negligent. But if his negligence enhanced the injury, he can only recover such damages as are the natural and probable consequence of the defendant's act. *Wright* v. *Illinois, etc., Tel. Co.*, 20 Iowa, 195; *Beers* v. *Housatonic R. R. Co.*, 19 Conn. 566. In an action for injuries caused by a vicious animal kept by the defendant in his pasture, the mere fact that the plaintiff was a tres-

passer at the time will not, as a matter of law, defeat the action, if the plaintiff's own negligence did not contribute to the injury. *Marble* v. *Ross*, 124 Mass. 44.

And, the fact that the plaintiff permitted his horses or cattle to run at large in a highway, whereby they strayed upon a railroad track, will not preclude him from a recovery therefor, if killed or injured by being run over by a train, when the engineer, by the exercise of ordinary care, might have prevented the injury (*Card* v. *N. Y. & Harlem R. R. Co.*, 50 Barb. 39; *Illinois Cent. R. R. Co.* v. *Middlesworth*, 46 Ill. 494; *Chicago, etc., R. R. Co.* v. *Hogarth*, 38 id. 370; *Kerwhacker* v. *Cleveland, etc., R. R. Co.*, 3 Ohio St. 172); and the same rule prevails as to animals run upon by teams in a highway (*Davies* v. *Mann*, 10 M. & W. 546); or for injuries to a vessel by being run against by another vessel, when the crew knew of its position, although the vessel injured was upon the wrong side of the channel, and displayed no lights (*Tuff* v. *Warman*, 5 C. B. [N. S.] 573); so, for injuries to a team upon a highway, although it was upon the wrong side of the highway, if the defendant, by proper care on his part, might have averted the injury (*Spofford* v. *Harlow*, 3 Allen, 176); and so generally, when the defendant, by the exercise of ordinary care, might have averted the injury, he will be held responsible, unless the plaintiff's negligence, directly or proximately, contributed thereto. In the case of persons bringing actions against a municipal corporation for injuries sustained by falling upon an icy sidewalk, the fact that he did not wear rubbers, or adopt other precautions to avoid falling, and was walking at his usual gait, will not preclude him from a recovery (*Todd* v. *City of Troy*, 61 N. Y. 506); and a traveler has a right to assume that a municipality or an individual has performed its duty in reference to such matters, unless he has notice to the contrary. *Weston* v. *N. Y. Elevated R. R. Co.*, 17 Alb. L. J. 415. But if a person walking along sees, or by the exercise of ordinary care might have seen, that the walk is covered with ice, and that it is in that respect in a dangerous condition, he is bound to exercise due caution in passing along it, and failing to do so, would be precluded from a recovery. *Todd* v. *City of Troy*, 61 N. Y. (16 Sick.) 506, 510.

§ 4. **Who may make the defense.** The defense of contributory negligence may be interposed by any person or corporation against whom an action is pending for negligence, or for any act which is excused or mitigated by the negligent conduct of the plaintiff. Thus, a physician who is sued for malpractice may show in defense that the plaintiff, or those having the care of him, by their negligent conduct contributed to increase or enhance the injury, or that, except for such contributive

negligence, no ill results would have ensued from his acts, even though he did not exercise such care and skill as the case demanded. *McCandless* v. *Mc Wha*, 25 Penn. St. 95; *Hibbard* v. *Thompson*, 109 Mass. 286; *Smith* v. *Smith*, 2 Pick. 621. Vol. 4, pp. 681, 682. So, in an action against an attorney for neglecting to perform certain duties, he may show that his failure was the result of some neglect on the part of his client (*Jackson* v. *Tilghman*, 1 Miles [Penn.], 31); and generally, any person may set up the contributive negligence of the plaintiff, when such negligence on his part operates as a defense to the action, either in whole or in part.

§ 5. **Against whom.** The defense may be interposed against any person who seeks to fasten liability upon another for some act or omission, when, by reason of his own neglect, the defendant is, or ought to be, in whole or in part, excused from the consequences of his act or omission. Thus, a surety upon a note may, in an action against him thereon by the payee or holder thereof, set up negligence on the part of the plaintiff in enforcing its collection against the principal, at a time when the maker was solvent, and was requested to do so by the defendant. *Hartman* v. *Burlingame*, 9 Cal. 557; *Colgrove* v. *Tallman*, 67 N. Y. (22 Sick.) 95; 23 Am. Rep. 90; *Hubbard* v. *Gurney*, 64 N. Y. (19 Sick.) 457; *Pain* v. *Packard*, 13 Johns. 174; *King* v. *Baldwin*, 17 id. 384. So, the drawer of a bill or check may, in an action thereon against him by the payees, set up their negligence in presenting the same to the drawer for payment, at a time when he was solvent. *East River Bank* v. *Gedney*, 4 E. D. Smith (N. Y.), 582; *Moore* v. *Waitt*, 13 N. H. 415; *Kelley* v. *Brown*, 5 Gray, 108; *Curry* v. *Herlong*, 11 La. Ann. 634. So, an indorser of a note or bill in an action thereon by the indorsee may set up in defense the fact that the note or bill was not presented or protested at maturity (*Lawrence* v. *Langley*, 14 N. H. 70; *Groth* v. *Gyger*, 31 Penn. St. 271; *Moses* v. *Ela*, 43 N. H. 557; *Galpin* v. *Hard*, 3 McCord, 394); and generally, in all cases, where a certain duty is imposed upon a person as a condition precedent to his right of recovery, his neglect to discharge that duty may be interposed as a defense by any person against whom liability is sought to be enforced. In *Prideaux* v. *City of Mineral Point*, 43 Wis. 513, it is held that the driver of a private conveyance is the agent of the person in such conveyance, so that his negligence, contributing to the injury complained of by such person, as caused by a defective highway, will defeat the action. See, also, *Houfe* v. *Fulton*, 29 Wis. 296; S. C., 9 Am. Rep. 568.

§ 6. **How interposed.** This defense may be made under the general issue, or under a general denial (*MacDonell* v. *Buffum*, 31 How. [N.

Y.] 154; *Brown* v. *Elliott*, 45 id. 182; S. C., 4 Daly, 329); and it is unnecessary for the defendant to aver that the plaintiff's negligence contributed to the injury. Id. And a plea setting up such facts amounts merely to the general issue. *Bridges* v. *Grand Junction R. R. Co.*, 3 M. & W. 244, 246.

§ 7. **How proved.** In some of the States it is held that the burden of proof, in an action of negligence, is upon the plaintiff not only to establish negligence on the part of the defendant, but also freedom from negligence on his own part. *Michigan Cent. R. R. Co.* v. *Coleman*, 28 Mich. 440; *Maxfield* v. *Cincinnati, etc., R. R. Co.*, 41 Ind. 269; *Griffin* v. *Mayor, etc.*, 9 N. Y. 456; *Curran* v. *Warren Chemical, etc., Co.*, 36 id. 153; *Park* v. *O'Brien*, 23 Conn. 339; *Walker* v. *Herron*, 22 Tex. 55; *Allyn* v. *Boston, etc., R. R. Co.*, 105 Mass. 77; *Dyer* v. *Talcott*, 16 Ill. 300; *Benton* v. *Central City R. R. Co.*, 42 Iowa, 192. But the tendency of the courts of most of the States is, to hold that contributory negligence is a matter of defense, and must be established by the defendants in the same manner and by the same class of evidence as is required to establish any other defense. *Frech* v. *Phil., etc., R. R. Co.*, 39 Md. 574; *Johnson* v. *Hudson R. R. Co.*, 5 Duer [N. Y.], 21; *Hays* v. *Gallagher*, 72 Penn. St. 136; *Indianapolis, etc., R. R. Co.* v. *Horst*, 93 U. S. 291; *Hoyt* v. *Hudson*, 41 Wis. 105; 22 Am. Rep. 714; *Prideaux* v. *City of Mineral Point*, 43 id. 513; *Hocum* v. *Weitherick*, 22 Minn. 152; *New Jersey, etc., Co.* v. *Nichols*, 32 N. J. Law, 166; *May* v. *Hanson*, 5 Cal. 360; *Railroad Co.* v. *Gladman*, 15 Wall. 401; *Robinson* v. *Western Pacific R. R. Co.*, 48 Cal. 409; *McWilliams* v. *Detroit Cen. Mills Co.*, 31 Mich. 274.

But in Massachusetts it is held that the plaintiff is not bound to prove due care on his part, but that the jury are at liberty to infer it from the absence of all appearance of fault either positive or negative on his part, in the circumstances under which the injury was inflicted (*Mayo* v. *Boston, etc., R. R. Co.*, 104 Mass. 137; *Marble* v. *Ross*, 124 id. 44); and such is the rule in New York (*Johnson* v. *Hudson R. R. Co.*, 20 N. Y. 65; *Wilds* v. *Hudson R. R. Co.*, 24 id. 430); and in Illinois. *Illinois Cent. R. R. Co.* v. *Cragin*, 71 Ill. 177. See Vol. 4, pp. 719, 720.

It is held to be error to instruct the jury that contributory negligence, to defeat the action, must be proven *conclusively* to their minds. *Prideaux* v. *City of Mineral Point*, 43 Wis. 513. Juries are never held to find mere matters of fact on conclusive evidence. Id.

# CHAPTER XIII.

## COVENANT NOT TO SUE.

### ARTICLE I.

#### GENERAL RULES.

**Section 1. Definition and nature.** A covenant not to sue is an agreement under seal, by which the covenantor, for a sufficient consideration, covenants that he will not bring an action against the covenantee upon any of the matters, or for any of the causes specially named in the covenant. In law it operates either as a release, or as a suspension of the cause of action, according to its terms. A covenant not to sue, general in its terms, and unlimited as to time, is a release of the cause of action, and may be so pleaded. *Walker* v. *McCulloch*, 4 Me. 421; *Garnett* v. *Macon*, 6 Call (Va.), 308; *Jones* v. *Quinnipiack*, 29 Conn. 25; *Stebbins* v. *Niles*, 25 Miss. 269; *Phelps* v. *Johnson*, 8 Johns. 54. But if the covenant be not to sue within a particular time, it does not operate as a release, but merely as a suspension of the right to sue, and if suit is brought within the period named, the covenant may be pleaded to defeat the action (*Ayliff* v. *Scrimsheire*, 1 Show, 46), but not in bar of it. *Winans* v. *Huston*, 6 Wend. 471; *Hoffman* v. *Brown*, 6 N. J. Law, 429; *Gibson* v. *Gibson*, 15 Mass. 112. It amounts to a defeasance, because it defeats, during its existence, the force or operation of the claim to which it relates (*Ayliff* v. *Scrimpshire*, Carth. 64), and must be of as high character as the instrument it is sought to defeat. *Hayford* v. *Andrews*, Cro. Eliz. 697. A general covenant not to sue is an absolute defeasance, while a covenant not to sue for a specified time is a conditional defeasance. *Fowell* v. *Forrest*, 2 Wms. Saund. 48, *note*; *Winans* v. *Huston*, 6 Wend. 471. It was held in the case first cited that a defeasance, in order to be operative, must have been made at the same time as the instrument that it is sought to defeat. But such is not the rule, and a covenant not to sue is operative and effectual although made *after* the instrument which it is set up to defeat. Co. Litt. 207, *a*, 236 *b*; *Hush* v. *Philips*, Cro. Eliz. 754. This covenant is permitted to be pleaded in bar, in order to avoid circuity of action. *Lacy* v. *Kinnaston*, 3 Salk. 298.

In equity, a parol release of a sealed instrument is treated as an agreement not to sue, and is valid, if founded upon a sufficient consideration. *Albert* v. *Ziegler*, 29 Penn. St. 50. At law, an oral agreement not to sue a claim for a specified time, or to extend the time of payment of a simple contract, if predicated upon a good consideration, suspends the right of action, and may be set up to defeat the action, if brought during the life of the agreement. But a parol agreement not to sue upon an instrument under seal is inoperative and cannot be set up to defeat the action, whatever may have been the consideration therefor. In order to be operative such an agreement must be of as high a nature as the instrument to which it relates. *Hayford* v. *Andrews*, Cro. Eliz. 697.

Thus, where to debt upon a bond conditioned for the payment of money, the defendant pleaded that the plaintiff, "in writing under his own hand, agreed to give time" to a future day, the plea was held bad upon demurrer, because it did not set forth an agreement under seal. *Blemerhasset* v. *Pierson*, 2 Lev. 234; *Cabell* v. *Vaughn*, 1 Saund. 291. And it seems that unless the instrument set forth in the pleading is such as in its very nature imports an instrument *sealed by the party*, as, an indenture, deed or writing obligatory (*Hunton* v. *Wolf*, Cro. Eliz. 737; *Moore* v. *Jones*, 2 Str. 815), it must not only be stated in the plea, that the instrument is under seal, *but that it was sealed by the party*. And a plea setting forth that "the plaintiff by an instrument in writing signed by his own hand, and under seal," is demurrable; because it does not state that it was sealed by the party himself (*Blemerhassett* v. *Pierson*, 2 Lev. 234), as the law will not intend that the party sealed the instrument himself, unless so expressed in the plea, as by the words "under his hand and seal," or other words that show that he in fact attached his seal to the instrument (*Fitzgerald* v. *Crogg*, Comyn, 139; *Hollingworth* v. *Afcue*, Cro. Eliz. 355), unless the words "by indenture," "by deed" or "by a writing obligatory," are used, in which case the law imports an instrument sealed by the party executing it. *Penson* v. *Hodges*, Cro. Eliz. 737; *Atkinson* v. *Coatsworth*, 1 Str. 512. See *Fowell* v. *Forrest*, 2 Wms. Saund. 47 *dd*, *notes*. Whether these technicalities in pleading would now be insisted upon may be somewhat doubtful, but the rules of good pleading would suggest the propriety of observing this particularity, and no one but a careless and slovenly pleader would fail to do so, and thus jeopardize the effect of his plea.

§ 2. **What is such a covenant, and when a defense.** As to what constitutes a covenant not to sue, has been stated in the preceding section, and it need only be added that, unless the covenant is express not

to sue; that is, if such is claimed to be the legal effect of a covenant, such force will only be given to it, when it clearly appears that it was the intention of the party to release the cause of action perpetually, or to suspend the right of action for a specified time. *Parker* v. *Holmes*, 4 N. H. 97. Thus, the payee of a note executed to the maker a bill of sale of certain property and notes, particularly describing them, and of "all other debts, notes and accounts of whatever nature, due me," and it was held that this did not operate as a transfer of this particular note, nor as a release of the liability of the maker. *Morrill* v. *Morrill*, 26 Cal. 288. In order to have that effect, such must be the necessary effect of the instrument and the evident intent of the parties, a covenant being always construed according to the particular purpose and intent for which it was executed. *Solly* v. *Forbes*, 4 Moore, 448. This principle was well illustrated in a case where a release was executed under the directions of an award of arbitrators. It was so drawn that it might include other matters than those adjudicated by the arbitrators, but the court held that the generality of the words should be restrained by the *intention* of the parties. *Upton* v. *Upton*, 1 Dowl. P. C. 400. A covenant of this character is a defense by the person in whose favor it was made, as to any matter embraced therein, but it does not operate as a defense to any new cause of action, arising *subsequent* to its execution (*Brigham* v. *Eveleth*, 9 Mass. 438); nor is it a defense unless the party setting it up has performed all the conditions upon which it is predicated.

Thus, where a creditor entered into a covenant with his debtor to receive the debt by installments, and the debtor failed to pay the first installment when it became due, it was held that upon such failure the creditor was entitled to sue for the whole debt, and that the covenant to receive it in installments was no defense to the action. *Upham* v. *Smith*, 7 Mass. 265. A covenant not to sue having been pleaded by way of defense to an action cannot subsequently form the basis of an action in favor of the covenantees for its breach. *White* v. *Dingley*, 4 Mass. 433.

§ 3. **Effect of such covenants.** A covenant never to sue operates as a release of the particular claim or claims specified, and affords a good bar to an action brought to enforce them (*Stebbins* v. *Niles*, 25 Miss. 267; *Guard* v. *Whiteside*, 13 Ill. 7; *Jones* v. *Quinnipiack*, 29 Conn. 25; *Sewall* v. *Sparrow*, 16 Mass. 24); and the rule is the same in all cases where the covenant is general, and there is no limitation as to time. *Gibson* v. *Gibson*, 15 Mass. 112; *Phelps* v. *Johnson*, 8 Johns. 54; *Clopper* v. *Union Bank*, 7 Harr. & J. (Md.) 92.

But where the covenant is limited to a particular time, it has been

held that it could not be pleaded in bar to an action brought within the time, but that the party must resort to an action upon the covenant. *Winans* v. *Huston*, 6 Wend. 471; *Perkins* v. *Gilman*, 8 Pick. 229; *Hoffman* v. *Brown*, 6 N. J. Law, 429; *Thimbléby* v. *Barron*, 3 M. & W. 211. But the better opinion seems to be that, where the action is not in covenant, the conditional covenant may be set up to defeat the action until the time of indulgence has expired (*Clopper* v. *Union Bank of Maryland*, 7 Harr. & J. [Md.] 93); and in any case, when the covenant or agreement is limited, but contains a condition that, in case of its violation, it shall operate as a discharge, it affords a good ground for a plea in bar; for by such violation the right of action is discharged. *White* v. *Dingley*, 4 Mass. 433.

While a covenant not to sue is treated as a release, yet its legal effect is not the same. A release of one joint debtor, in law, discharges all. *Kiffin* v. *Willis*, 4 Mod. 379; *American Bank* v. *Doolittle*, 14 Pick. 123; *Brown* v. *Marsh*, 7 Vt. 327; *Elliott* v. *Holbrook*, 33 Ala. 659; *Vandever* v. *Clark*, 16 Ark. 331. But a covenant not to sue one of several joint debtors does not discharge the others, who are not parties to the covenant. *Walmesley* v. *Cooper*, 11 Ad. & El. 216; *Goodnow* v. *Smith*, 18 Pick. 416; *McClellan* v. *Cumberland Bank*, 24 Me. 566; *Matthey* v. *Gally*, 4 Cal. 62; *Couch* v. *Mills*, 21 Wend. 424. The covenant is personal, and only operates in favor of those who are parties thereto (*Bozeman* v. *State Bank*, 7 Ark. 328; *Gould* v. *Stanton*, 16 Conn. 12); and if other parties are liable with the covenantee, upon the claim which the covenantor has covenanted not to sue, and he is subsequently joined as a party defendant with the others, the covenant cannot be set up to defeat the action. But the covenantee must resort for redress to an action upon the covenant. *Turner* v. *Davies*, 2 Saund. 150, *n.* 2; *Dawes* v. *Jeffries*, And. 307. Thus, if A is bound to B, and B covenants never to sue A upon the bond, the covenant is a release of A and bar to an action thereon against A. But if A and B are jointly bound to C, and C covenants not to sue A thereon, but does not covenant not to sue B, the covenant is not a release in its nature as to either A or B, but stands as a covenant simply, and cannot be set up as a bar to an action brought against A and B. But A must resort to an action on the covenant to recover his damages for its breach. *Lacy* v. *Kynaston*, 12 Mod. 548; *Storer* v. *Gordon*, 3 M. & S. 308; *Dean* v. *Newhall*, 8 T. R. 168; *Turner* v. *Davies*, 2 Saund. 150, *n.* 2. And the rule is the same where the covenant is not to sue one of two *tort-feasors*. The covenant not operating as a release of the covenantee, cannot be set up by the other *tort-feasor* as a bar to an action against him. *Snow* v. *Chandler*, 10 N. H. 92.

§ 4. **Who may interpose it.** As previously stated, this covenant is personal, and can only be interposed by the covenantee. *Bozeman* v. *State Bank*, 7 Ark. 328. Thus, where A covenanted with B not to sue or molest him in his person or estate, for any estate, or act in relation to any estate of C, or for any property assigned by C in his life-time to D, and to save B harmless therefrom, it was held that, although these writings would, as between the parties, have the effect of a release, yet, they were personal between the parties, and did not affect any claim in favor of or against other parties in relation to the estate. *Gould* v. *Stanton*, 16 Conn. 12. See, also, *Couch* v. *Mills*, 21 Wend. 424, where it was held that a covenant by the payee of a note not to sue one of several joint makers could not be set up as a defense to an action thereon.

§ 5. **How interposed.** A covenant not to sue, like a release, must be specially pleaded, and cannot be made available under the general issue. *Johnson* v. *Kerr*, 1 S. & R. (Penn.) 25.

# CHAPTER XIV.

## COVERTURE.

### ARTICLE I.

#### OF COVERTURE AS A DEFENSE.

**Section 1. In general.** Coverture, at common law, is a bar to an action brought against a married woman alone, upon any contract entered into by her, in her own name, either before or after marriage. *Howes* v. *Bigelow*, 13 Mass. 384; *Moses* v. *Fogartie*, 2 Hill (S. C.), 335; *Gilbert* v. *Plant*, 18 Ind. 308. If, however, an action was commenced against her while she was sole, the action does not abate, but the plaintiff may proceed to judgment and issue execution against the wife, without taking any notice of the husband. *Cooper* v. *Hunchin*, 4 East, 521; *King* v. *Jones*, 2 Str. 811. But he cannot levy his execution upon the property of the wife, nor can he take her body thereon, but he may sue out a *scire facias*, or bring debt upon the judgment against the husband and wife, and the husband will not be permitted to inquire into the merits of the judgment. *Haines* v. *Corliss*, 4 Mass. 659. If, however, the wife dies before a joint judgment is obtained, the creditor cannot obtain a judgment against the husband (*Heard* v. *Stamford*, 3 P. Wms. 411); and this is so, even though he acquired all her property before her death. *Tabb* v. *Boyd*, 4 Call (Va.), 453; *Morrow* v. *Whitesides*, 10 B. Monr. 411. But if she dies after judgment against both, but before execution has issued, an execution may issue against the husband alone, because the judgment has altered the debt. *O'Brian* v. *Ram*, 3 Mod. 186. From the moment of her marriage, by the common law, the wife is placed under legal disabilities, and, in a word, loses her identity in a legal sense. She has no power of entering into any kind of contract on her own behalf, so as to incur any legal liability thereon, as, in law, her separate existence, so far as any liability *ex contractu* is concerned, is annihilated. *Farrar* v. *Bessey*, 24 Vt. 89; *Long* v. *Long*, 14 N. J. Eq. 462.

§ 2. **When available as a defense.** From what has already been said as to the effect of marriage upon the rights and powers of a *feme sole* it follows as a matter of course, that she cannot be sued alone upon

any contract entered into by her before marriage. By the marriage the husband succeeds, or may succeed to all her rights, and as a consequence he is burdened with all her liabilities, and if she is sued alone upon such a contract, she may plead her coverture in abatement of the action. But she may be joined with her husband, as co-defendant in such an action, and in that case her coverture does not operate as a defense. *Morris* v. *Norfolk*, 1 Taunt. 212. Indeed she *must* be joined with the husband upon all contracts made by her before marriage, because they are not his contracts. *Mitchinson* v. *Hewson*, 7 T. R. 348. The liability of the husband for the debts of the wife contracted before marriage continues only during coverture, consequently upon her death, or upon a dissolution of the marriage by the courts, his liability ceases. *Cole* v. *Shurtleff*, 41 Vt. 311; *Bryan* v. *Doolittle*, 38 Ga. 255; *Waul* v. *Kirkman*, 13 Sm. & M. 599. So it ceases with his death, and his estate cannot be charged with such claims (*Cureton* v. *Moore*, 2 Jones' Eq. [N. C.] 204; *Chapline* v. *Moore*, 7 Monr. 150); nor can his estate be charged with debts created by her *after* his death. *Howes* v. *Bigelow*, 13 Mass. 384. Coverture is a good defense to an action brought upon a note executed by the wife during coverture, although her husband is dead, and she has promised to pay the note since his death (*Goodhue* v. *Barnwell*, Rice's [S. C.] Ch. 198; *Howe* v. *Wildes*, 34 Me. 566; *Porterfield* v. *Butler*, 47 Miss. 165); unless a new consideration for such promise is shown. *Vance* v. *Wells*, 6 Ala. 737; *Bauer* v. *Bauer*, 40 Mo. 61. But in many of the States, by statute, a married woman possesses the power to charge her separate estate by her own contract, and in such cases, she may be sued thereon as though sole (*Corn Exchange Ins. Co.* v. *Babcock*, 42 N. Y. [3 Hand] 613); and, when she purchases property in her own name, and upon her own credit, it will be presumed that she intended to charge her separate estate therewith, although the property purchased was what are denominated necessaries, and such as she could have pledged the credit of the husband for. *Miller* v. *Brown*, 47 Mo. 504; 4 Am. Rep. 345; *Phillips* v. *Graves*, 22 Ohio St. 371.

Although a married woman may, by statute, possess the power to contract debts in her own name, and to charge her separate estate therewith, and may by such statute be sued alone thereon, in the State where the contract is made, yet she cannot be made liable thereon in another State where she has her domicile, in which no such statute exists, and in such a case, her coverture is a complete defense to an action against her on the note. *Bank* v. *Williams*, 46 Miss. 618; S. C., 12 Am. Rep. 319.

Coverture is a good defense to a mortgage made by a married woman

upon her separate real estate except where the statute otherwise provides. *Simpers* v. *Sloan*, 5 Cal. 457. Even where a married woman by statute is clothed with power to contract in reference to her sole estate, coverture is *prima facie* a defense to an action upon a note executed by her which is silent as to the capacity in which she executed it, the presumption being that the debt for which it was given was for the common benefit of her husband and herself (*Bowles* v. *Turner*, 15 La. Ann. 352); and in order to prevent the operation of the defense, it must be shown that she held property for her sole and separate use (*Shannon* v. *Canney*, 44 N. H. 592); and that the debt inured to her separate benefit. *Thompson* v. *Chick*, 19 La. Ann. 206. Coverture is a defense at common law to an action upon a contract entered into by her for the purchase of land (*Johnston* v. *Jones*, 12 B. Monr. [Ky.] 326); or for the sale of her land (*Lane* v. *McKeen*, 15 Me. 304; *Butler* v. *Buckingham*, 5 Day [Conn.], 492; *Pilcher* v. *Smith*, 2 Head, 208); or upon an agreement to lease it. *Andriot* v. *Lawrence*, 33 Barb. 142.

So, even where by statute she is authorized to convey lands held to her separate use, she cannot bind herself by a covenant of warranty in the deed (*Nunnally* v. *White*, 3 Metc. [Ky.] 584), and, except so far as authorized by statute, her deed is a nullity (*Herrington* v. *Herrington*, 1 Miss. 322), unless her husband joins with her in the conveyance (*Manchester* v. *Hough*, 5 Mas. [C. C.] 67; *Gillespie* v. *Johnson*, Wright [Ohio], 231), and without stopping to particularize more fully, it may be said that coverture, by the common law, is a full and complete defense to an action against a married woman alone, upon any contract or obligation entered into by her before her marriage, as well as to all contracts or obligations entered by her during marriage; and that, as to contracts entered into by her during marriage, the husband cannot be charged, unless he authorized her to make them, or they were for necessaries (*Hancock* v. *Merrick*, 10 Cush. 41; *Zeigler* v. *David*, 23 Ala. 127; *Rea* v. *Durkee*, 25 Ill. 503; *Mott* v. *Comstock*, 8 Wend. 544); and in any case, if credit was given to the wife alone, the husband cannot be held liable therefor, as the very fact that credit was given to her repels the presumption of an obligatory contract on the husband. *Carter* v. *Howard*, 39 Vt. 106; *Hill* v. *Goodrich*, 46 N. H. 41; *Taylor* v. *Shelton*, 30 Conn. 122; *Simmons* v. *McElwain*, 26 Barb. 419. Thus, where money was deposited with the wife, it was held that the husband could not be charged therefor unless it was shown that she received it at his request, or was authorized to receive it as his agent. *Gilbert* v. *Plant*, 18 Ind. 308. *Prima facie* the husband is not responsible even for necessaries, furnished to his wife

when she is living separate and apart from him, and, in order to charge him therefor, it must be shown either that she is so living with his assent, or that he deserted her, or that she left him because she was, by reason of his misconduct or ill treatment, compelled to do so (*Rea* v. *Durkee*, 25 Ill. 503; *Snover* v. *Blair*, 25 N. J. Law, 94; *Mott* v. *Comstock*, 8 Wend. 544; *Brown* v. *Mudgett*, 40 Vt. 68; *Porter* v. *Bobb*, 25 Mo. 36), and the burden is upon the plaintiff to establish all the elements requisite to charge the husband with liability. *Walker* v. *Simpson*, 7 Watts & Serg. 83; *Munroe County* v. *Budlong*, 51 Barb. 493; *Frost* v. *Willis*, 13 Vt. 202; *Allen* v. *Aldrich*, 29 N. H. 63. If he is shown to have assented to her living apart from him, he cannot prevent a recovery by showing that he made her an ample allowance for her support, if that allowance was in fact inadequate. *Reese* v. *Chitton*, 36 Mo. 598.

Not only is coverture a complete defense at common law to an action against the wife arising out of any contract, but it is a complete defense to tortious actions *growing out of them*, and this is the rule even though the husband is joined with her as a party defendant; because, being exempt from contract liability except as stated, *ante*, 607, § 1, she cannot be joined as co-defendant with the husband in any action upon a contract made by her during coverture, *or upon any matter growing out of or connected therewith.* She cannot be made chargeable upon a warranty made by her, nor for fraud or deceit practiced by her either in buying or selling property. *Liverpool, etc., Loan Association* v. *Fairhurst*, 9 Exch. 422. This doctrine was held and satisfactorily sustained in the case last cited. In that case the wife was sued jointly with the husband for the fraud of the wife in fraudulently representing to the plaintiffs that she was sole and unmarried at the time of signing a note with the husband, in consequence of which the plaintiff was induced to loan the husband the sum of £30, upon the note. The court held that the action could not be maintained against the wife, Pollock, C. B., saying: "A *feme covert* is unquestionably incapable of binding herself by a contract; it is absolutely void, and no action will lie against herself or her husband for the breach of it. But she is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as defendant. They are liable therefore for frauds committed by her on any person, as for any other personal wrongs. *But where the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction*, the wife cannot be responsible and the husband be sued for it together with the wife." A similar doctrine, in a case involving similar facts, was held in *Cooper* v. *Witham*, 2 Lev. 247. In *Cross* v.

*Evarts*, 28 Tex. 523, it was held that a refusal by a married woman to fulfill a promise made by her to convey her homestead, which promise, the plaintiff might have known she had a right to retract at any time, would not support an action for damages for the fraud.

It is held by some of the courts that the executory contract of a married woman being void as a contract cannot be supported upon the ground of estoppel. *Oglesby Coal Co.* v. *Pasco*, 79 Ill. 164; *Wood* v. *Terry*, 30 Ark. 385. But in Michigan it has been held that she may be estopped by her deliberate conduct misleading another (*Norton* v. *Nichols*, 35 Mich. 148); and a similar doctrine has been held in New Hampshire. Thus, where a married woman induced the plaintiff to sell her goods by representing that she was the owner of a certain bank check for $100, out of which she promised to pay for the goods when delivered, it was held that she was estopped from denying that she was the owner of the check, and therefore, as under the statute the case showed a contract respecting her separate property, she might be sued personally thereon. *Read* v. *Hall*, 57 N. H. 482. But at common law the rule would be otherwise, and she could not be made chargeable, either upon the ground of estoppel or fraud. *Liverpool, etc., Loan Ass'n* v. *Fairhurst*, 9 Exch. 422; *Wood* v. *Terry*, 30 Ark. 385; *Oglesby Coal Co.* v. *Pasco*, 79 Ill. 164. Even where, by statute, a married woman is permitted to make contracts binding upon herself respecting her separate estate, it is held that she has no power to do this without the consent of her husband, unless she expressly, or by necessary inference, charges her estate therefor (*Pippen* v. *Wesson*, 74 N. C. 437); and if a married woman has no separate estate she cannot be held chargeable personally for a debt contracted by her, unless she charges the very property which she purchases therewith. *Mears* v. *Kearney*, 1 Abb. (N. Y.) N. C. 303; *Spencer* v. *Humiston*, 9 Hun (N. Y.), 71. The husband cannot be made chargeable for debts created by the wife in reference to her separate estate (*Trieber* v. *Stover*, 30 Ark. 727); nor can the separate estate of the wife be made chargeable with debts created by the husband, although the property for which the debt was created was used for the benefit of her separate property; and this is so, even though she had contemporaneous knowledge of such purchase, and of the use to which the property was to be, and in fact was put; as, for materials with which to erect buildings upon her land. *Ferguson* v. *Spear*, 65 Me. 277; *Esslinger* v. *Huebner*, 22 Wis. 632; *Corning* v. *Lewis*, 54 Barb. 51; 36 How. 425. But if the husband fraudulently represents himself to be the owner of the property, and the wife knows it, and sanctions and adopts the benefit of the fraud, she will be liable. *Mattice* v. *Lillie*, 24 How. 264; *Miller* v. *Hunt*, 1 Hun, 491; 3 N. Y. (T. & C.) 762.

Coverture is a complete defense to an action brought either against the husband and wife separately or jointly, for property purchased by the wife upon credit, of one who did not at the time of giving such credit know that she was a *feme covert*. In such a case he cannot claim that he gave credit to the husband, or upon the expectation that he would pay for the goods, and, where goods are sold under such circumstances, unless they are shown to have been consumed in the husband's family, or in some way come to his use, or that he has sanctioned or adopted her contract, he cannot be made chargeable therefor, nor can the amount be recovered of the wife. *Freestone* v. *Butcher*, 9 C. & P. 643. Where a husband is living with his wife in his own house he is liable for goods which he *permits* her to receive there; she is considered as his agent, and the law implies a promise on his part to pay their value. But it must be understood that he must *know* that she receives the goods, and that she has no other means of paying therefor except such as he provides. Id. If they are not cohabiting, he is only liable for such necessaries as from his situation in life he is able to supply her. But it seems that even where they are parted, and he knows of and has any control over goods improvidently ordered by her, so as to have it in his power to return them to the trader, and he does not do so, or cause them to be returned, he adopts her act and renders himself liable. And it makes no difference what may be the husband's circumstances, *if he allows his wife to assume an appearance which he is unable to support*, he is answerable for the consequences; the rule being that, where a person is deceived, the loss must fall upon him by whose connivance it occurred. *Waithman* v. *Wakefield*, 1 Camp. 120. But it is the duty of a person to make inquiries before giving credit to a married woman who is a stranger to him, and if he neglects to do so, he must suffer the consequences resulting from the lack of such information as he might have obtained upon reasonable inquiry. Id.; *Montague* v. *Espinasse*, 1 C. & P. 502. The ground upon which the wife's contracts bind the husband is by presumed assent only; consequently, except as to necessaries, if he did not *know* of the contract, or if he expressly dissented before the contract was entered into, he cannot be made chargeable thereon (*Etherington* v. *Parrot*, 1 Salk. 118); and this rule applies in all cases where the husband has forbidden people from trusting his wife on his account. Even though he has never given such notice, it was said by Holt, C. J., in the case last cited, that if a wife "takes up goods, as silks, for the purpose, and pawns them before they are made into clothes, the husband shall not pay for them; because they never came to his use; otherwise if they are made up and worn, and then pawned." But it would hardly seem that the last proposition of the learned chief justice is regarded as a sound rule of law, unless the

dresses were *necessaries*, within the strict rule, or unless her husband had *seen her wear them*, or knew that she had them (*Montague* v. *Espinasse*, 1 C. & P. 502); nor even then, if she had a separate estate, or other means of getting them, independent of him. Where the wife is living with her husband, she cannot *prima facie* charge her husband upon contracts entered into by her for necessaries. The person seeking to charge him with liability must go farther, and show, either that the husband did not supply her, or that he in some way, expressly or impliedly, gave his assent to the purchase. In the case last cited, the defendant's wife purchased of the plaintiff jewelry to the amount of £83. It was not shown that the defendant knew of the purchase, or that he had ever seen her wear the jewelry, and the court held that no recovery could be had therefor. Where credit is given to a married woman while she is living apart from her husband, *prima facie* he is not liable therefor, but the person seeking to charge him with liability must show that her so living proceeded from some cause which would justify it. *Mainwaring* v. *Leslie*, 2 C. & P. 507. As has previously been stated, the wife cannot be proceeded against upon her contracts made while married, although her husband is not chargeable thereon, and as to her, even after the death of her husband, coverture at the time when the contract was entered into is a complete and full defense, although she retains the property and derives an advantage therefrom after her husband's death (*Davis* v. *Burnham*, 27 Vt. 562; *Liverpool, etc., Loan Ass'n* v. *Fairhurst*, 9 Exch. 422); and even a promise by her to pay, made after her husband's death, will not fix her liability therefor, unless there is some new consideration therefor (*Vance* v. *Wells*, 6 Ala. 737; *Howe* v. *Wildes*, 34 Me. 566); and this is so, although she had a separate estate, unless it is shown that she contracted the debt in respect to it. *Shannon* v. *Canney*, 44 N. H. 592.

§ 3. **When not available as a defense.** Coverture is, at the common law, a complete defense to an action brought against a married woman upon a contract entered into by her while coverture existed, and this is so, even after her husband's death. *Liverpool, etc., Loan Ass'n* v. *Fairhurst*, 9 Exch. 422. But, although by her marriage she ceases to be personally liable upon debts created by her *before* she entered into the relation, so that, even though a judgment should be entered against her thereon, an execution to satisfy it cannot be levied upon either her body or estate, yet, after her husband's death, her liability thereon is revived, and she cannot set up the fact of her previous coverture in defense thereto. Her marriage does not discharge, but merely suspends her liability. But she is not, upon the death of her husband, responsible for debts created by her while married. *Woodman* v. *Chapman*, 1 Camp. 189.

A married woman living apart from her husband, *and having a separate estate, or a competent maintenance paid to her*, has been held liable to suit for necessaries furnished to her. *Barwell* v. *Brookes*, 3 Doug. 371. But, in the absence of these elements, unless the husband has deserted her, the mere fact that she lives apart from her husband does not remove her disabilities (*High* v. *Worley*, 33 Ala. 196; *Com.* v. *Cullins*, 1 Mass. 116); and this is so, even though she is living in adultery, and under such circumstances that the husband is not bound to contribute to her support, or liable for her debts, unless she has a separate estate, or a separate maintenance. *Gilchrist* v. *Brown*, 4 T. R. 766; *Stedman* v. *Gooch*, 1 Esp. 3.

Where the husband has deserted the wife, in the ordinary sense of the term, she may make contracts in her own name, and sue and be sued as a *feme sole* and *coverture* is no bar thereto. In such a case the husband is treated as having renounced all his marital rights and relations (*Ayer* v. *Warren*, 47 Me. 217; *Gregory* v. *Paul*, 15 Mass. 31; *King* v. *Paddock*, 18 Johns. 141; *Mead* v. *Hughes*, 15 Ala. 141); and this is also the rule when she is divorced *a mensa et thoro*. *Pierce* v. *Burnham*, 4 Metc. (Mass.) 303. But a mere temporary absence of the husband upon business, and with an intention of returning to his wife, does not divest her of the disabilities of coverture, or of the protection from liability upon contracts entered into by her during his absence (*Robinson* v. *Reynolds*, 1 Aik. [Vt.] 174; *Concord* v. *Bellis*, 10 Cush. 276); and this is so, even though the absence is long continued. Thus, where the husband had been absent seven years in the East Indies, it was held that the wife could not be treated as a *feme sole*, even though she had carried on business as such (*Com.* v. *Cullins*, 1 Mass. 116); but in a Pennsylvania case it was held that a *feme covert* whose husband was a mariner and had been absent upon a voyage for two years, leaving her no support but her labor, might be treated as a *feme sole* during his absence. *Valentine* v. *Ford*, 2 Browne (Penn.), 193. If the husband has been absent seven years, and has not been heard from, a presumption of his death is raised, and the wife is liable upon her contracts as a *feme sole* (*Boyce* v. *Owens*, 1 Hill [S. C.], 8; and the same rule prevails when the husband leaves the State with no intention of returning (*Bean* v. *Morgan*, 4 McCord, 148); and especially is this the case, if, after his departure, she has traded and contracted as a *feme sole*. *Mead* v. *Hughes*, 15 Ala. 141. But frequent protracted absences on the part of her husband do not have this effect, even though she has assumed to act and trade as a *feme sole*. *Rogers* v. *Phillips*, 8 Ark. 366. Coverture is not a defense in any case where the wife may be properly joined with the husband as a party defendant (*Williams* v. *Smith*, 1 Dowl. P. C. 632); nor is it a defense in an action against her for a *tort* committed

by her, even in the presence of her husband; as, for trover in wrongfully refusing to deliver up goods to the owner on demand (*Catterall* v. *Kenyon*, 3 Q. B. 310; 2 Gale & D. 545); or for a trespass (*Smalley* v. *Kerfoot*, 2 Stra. 1094); or, indeed, for any tortious act, not arising out of or immediately connected with a contract. *Adelphi Loan Ass'n* v. *Fairhurst*, 9 Exch. 422. In those States where, by statute, a married woman is permitted to make contracts in reference to her separate estate, and to sue and be sued in reference thereto, it is held that she can make no contract except in reference to her separate estate, and it is a good defense that the contract did not relate to or bind her separate property. *Ames* v. *Foster*, 42 N. H. 381; *McCormick* v. *Holbrook*, 22 Iowa, 487; *Young* v. *Paul*, 10 N. J. Eq. 401.

But where she is permitted to carry on business on her own account and in her own name, she binds herself personally, and also her property. She is regarded, so far as her business is concerned, and every thing connected with it, or appertaining to it, in the same light as a *feme sole*, and may sue and be sued as such. *Barton* v. *Beer*, 35 Barb. 78. Thus, in Massachusetts it is held that a married woman, who carries on the business of keeping boarders on her sole and separate account, and purchases goods to be used in her business upon her sole credit, is liable personally therefor, although her husband lived with her at the time she purchased the goods; but that if she did not purchase the goods on her own credit, or the vendee took the husband's note therefor, she cannot be charged therefor. *Parker* v. *Simonds*, 1 Allen, 258. See, also, to the same effect, and holding that a married woman trading on her sole account is liable upon a note executed by her therefor. *Goulding* v. *Davidson*, 26 N. Y. (12 Smith) 604. In New York, except where her contract relates to her separate estate, she does not become personally liable upon a note signed by her, as, where she signs as surety for her husband, nor does her estate become liable thereon, unless she expressly charges it with the debt (*Man. B. & M. Co.* v. *Thompson*, 58 N. Y. [13 Sick.] 80); or such an intent may be inferred from the surrounding circumstances, as, where she trades upon her own account and is living apart from her husband, supporting a separate household. *Conlin* v. *Cantrell*, 64 N. Y. (19 Sick.) 217; *Bogert* v. *Gulick*, 65 Barb. 322; S. C., 45 How. 385. In Wisconsin, her contracts, when necessary or convenient to the proper use and enjoyment of her separate estate, are held to be binding upon her personally, *but in no other case*. *Todd* v. *Lee*, 15 Wis. 365. In New York she has been held not liable upon an accommodation note, even in the hands of an innocent holder (*Scudder* v. *Gori*, 18 Abb. Pr. 223; S. C., 3 Robt. 661); and in North Carolina it is held that, under the statute, she has no power to contract a personal debt, even with the consent of the husband, unless her separate estate is

charged therefor, either expressly or by necessary implication. *Pippen* v. *Wesson*, 74 N. C. 437. Where a married woman signs a note with her husband, and a part of the consideration is a debt due from her husband, and a part for property sold to her, she cannot be made liable thereon, except to the extent of the consideration that moved to her. *Spencer* v. *Humiston*, 9 Hun (N. Y.), 71.

It would be impracticable in a work of this character to note all the changes made by statutes in reference to the powers of married women in the several States, from what they are at common law. Essential and important changes in many respects have been made, to ascertain the exact extent of which the statutes and the decisions thereunder, in the several States, should be consulted.

§ 4. **Coverture of plaintiff.** The marriage of a *feme sole* pending an action in her favor, by the common law, may be pleaded in abatement thereto, if a continuance of the action has not intervened between the plea and the marriage. *Haines* v. *Corliss*, 4 Mass. 659; *Wilson* v. *Hamilton*, 4 S. & R. 238; *Bates* v. *Stevens*, 4 Vt. 545; *Northum* v. *Kellogg*, 15 Conn. 569; *Boynton* v. *Boynton*, 21 N. H. 246. In most of the States provision is made by statute for this emergency, and, in a given case, the statute should be consulted to ascertain whether the common-law rule has been changed.

§ 5. **Coverture of defendant.** The marriage of a *feme sole*, while an action at law is pending against her, does not abate the suit, but the plaintiff may proceed to judgment without taking any notice of her husband; and this is so, whether she is sued in her own right or in a representative capacity. *Com.* v. *Phillipsburg*, 10 Mass. 78; *Campbell* v. *Bowne*, 5 Paige, 54; *Henderson* v. *McClure*, 2 McCord, 469. But the plaintiff cannot enforce the judgment by execution, either against her person or property, but must bring *scire facias* to revive the judgment against her and her husband, or bring debt upon judgment thereon against them (*Cooper* v. *Hunchin*, 4 East, 521; *King* v. *Jones*, 2 Stra. 811; *Heard* v. *Stamford*, 3 P. Wms. 409); and if she dies pending the proceedings, and before judgment, the husband is discharged from all liability thereon. Id. But if she dies after judgment, but before execution has issued, the husband is liable to execution thereon. *Storr* v. *Lee*, 1 P. & D. 633; *Lockwood* v. *Salter*, 5 B. & Ad. 303.

§ 6. **Defense, how interposed.** Coverture may be specially pleaded (*Wartley* v. *Rayner*, 2 Doug. 637; *Lake* v. *Ruffle*, 2 Har. & W. 203); or, it may be shown under the general issue, in all actions *ex contractu*, when the contract or obligation is void. *Lambert* v. *Atkins*, 2 Camp. 272; *Moss* v. *Smith*, 1 M. & G. 228); but not when it is only voidable. Id.

# CHAPTER XV.

## CUSTODY OF THE LAW.

### ARTICLE I.

#### ITS VALUE AS A DEFENSE.

**Section 1. In general.** That property is in the custody of the law is a good defense to an action or proceeding to recover the possession thereof. Thus, it is laid down as a well-established principle, that, whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being; and no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. *Buck* v. *Colbath*, 3 Wall. 341. See, also, *Hagan* v. *Lucas*, 10 Pet. 400; *Freeman* v. *Howe*, 24 How. (U. S.) 450; *Watson* v. *Jones*, 13 Wall. 679; *Noe* v. *Gibson*, 7 Paige, 513; *Russell* v. *East Anglian Railway Co.*, 3 McN. & G. 104. This principle is said to be essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction. A departure from it would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their powers from the same source; but the consequences of such a departure would be still more disastrous, in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit. MILLER, J., in *Buck* v. *Colbath*, 3 Wall. 334, 341.

§ 2. **As to executions.** In accordance with the principle stated in the preceding section, it is held that property once levied on under a valid execution remains in the custody of the law, and is not liable to be taken by another execution in the hands of a different officer, and especially by an officer acting under another jurisdiction. *Hagan* v. *Lucas*, 10 Pet. (U. S.) 400; *Taylor* v. *Carryl*, 20 How. (U. S.) 583;

*Clymer* v. *Willis*, 3 Cal. 363; *Dubois* v. *Dubois*, 6 Cow. 494; *Thompson* v. *Brown*, 17 Pick. 462; *Kidder* v. *Orcutt*, 40 Me. 589. The rule is, that where there are several authorities equally competent to bind the goods of a party, when executed by a proper officer, they shall be considered effectually and for all purposes bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed. *Payne* v. *Drewe*, 4 East, 523.

The first levy on property, whether made under the jurisdiction of the United States, or of a State, withdraws the property from the reach of process from the other jurisdiction. *Hagan* v. *Lucas*, 10 Pet. (U. S.) 400; *Taylor* v. *Carryl*, 20 How. 583. If a United States marshal holds a legal precept, commanding him to arrest a person, or to take an article of property, if such person or property be in the custody of a sheriff under a State process to enforce even a subordinate right, the marshal cannot execute his precept, but the person and the property, although within his district, are beyond his reach, so long as the custody of the sheriff shall continue. Id. See, also, 1 Sprague, 608, and cases cited, *ante*, p. 617, § 1. But see 1 Kent's Com. 410.

Property once sold under execution is not liable again to execution against the same defendant, without proof that the title had been revested in him. *Collins* v. *Pace*, Ga. Dec., Part II, 160.

§ 3. **As to attachments.** It is well settled, that property in the custody of the law cannot be attached. Thus, when an officer has levied an attachment on goods, and has them in his custody, no other officer can seize them under another writ. *Watson* v. *Todd*, 5 Mass. 271; *Robinson* v. *Ensign*, 6 Gray, 300; *Oldham* v. *Scrivener*, 3 B. Monr. (Ky.) 579; *Lathrop* v. *Blake*, 23 N. H. 46. And although the property is not in the actual custody of the first officer, but in the hands of a receiptor to whom he has intrusted it, the same rule prevails. *Thompson* v. *Marsh*, 14 Mass. 269; Drake on Attachment, § 267. Property attached by an officer of a United States court cannot be taken out of his hands by an officer, under process issued by a State court (*Lewis* v. *Buck*, 7 Minn. 104. See *ante*, p. 617, § 1), and where goods are held by a collector of the revenue of the United States, to enforce the payment of, or as security for, the duties thereon, they are in the custody of the law, and cannot be attached by a creditor of the importer. *Harris* v. *Dennie*, 3 Pet. (U. S.) 292. So, upon the principle that property in the custody of the law is exempt from attachment, it is held that money in the hands of the clerk of a court, by virtue of his office, cannot be attached (*Hunt* v. *Stevens*, 3 Ired. [N. C.] L. 365; *Ross* v. *Clarke*, 1 Dall. [Pa.] 354), and so of money paid into

court. *Farmers' Bank* v. *Beaston*, 7 Gill & J. (Md.) 421. See the cases collected, *ante*, Vol. 1, p. 425.

§ 4. **In replevin.** We have seen that property taken in execution is in the custody of the law, *ante*, p. 617, § 2. An action of replevin cannot, therefore, be maintained against an officer to obtain possession of goods in his possession under a valid execution. *Thompson* v. *Button*, 14 Johns. 84; *Griffith* v. *Smith*, 22 Wis. 646; *Raiford* v. *Hyde*, 36 Ga. 93; *Miller* v. *White*, 14 Fla. 435. See, as to this point, *ante*, Vol. 5, p. 463 *et seq.* Nor will replevin lie in a State court against a marshal of the United States for property attached by him on mesne process from a United States court against a third person. *Freeman* v. *Howe*, 24 How. (U. S.) 450. See *ante*, p. 618, § 3.

§ 5. **Other cases.** Property in the hands of a receiver appointed by the court is in the custody of the law, and is not legally liable to seizure by an officer under an execution. *Martin* v. *Davis*, 21 Iowa, 535. The same principle is applicable to every other interference with the possession of a receiver, sequestrator, committee, or custodian, who holds the property as the officer of the court. *Evelyn* v. *Lewis*, 3 Hare, 472; *Matter of Clark and Bininger*, 4 Benedict, 98. After a receiver, etc., has been appointed and has taken the rightful possession of the property, it is a contempt of court for a third person to attempt to deprive him of that possession by force, or even by a suit or other proceeding against him, without the permission of the court by whom the appointment was made. *Noe* v. *Gibson*, 7 Paige, 513; *Matter of Woven Tape, etc., Co.*, 12 Hun (N. Y.), 111; *O'Mohoney* v. *Belmont*, 62 N. Y. (17 Sick.) 133; affirming S. C., 5 Jones & Sp. 223. See Vol. 5, pp. 354, 355.

It has been held, that property in the hands of a garnishee is in the custody of the law, and that an officer has no right, after the garnishment, to take the property from the garnishee. *Dennistoun* v. *New York, etc., Faucet Co.*, 6 La. Ann. 782; *Brashear* v. *West*, 7 Pet. (U. S.) 608. On the other hand, it was decided in Massachusetts, that effects in the garnishee's hands may be attached and taken into the possession of the officer, subject to the lien of the creditor who effected the garnishment. *Swett* v. *Brown*, 5 Pick. 178; *Burlingame* v. *Bell*, 16 Mass. 318.

§ 6. **When not a defense.** Where a writ of *fieri facias* is delivered to the sheriff, with directions to suspend the execution, and in the meantime another writ is delivered by another creditor, the sheriff is bound to levy under the latter writ in preference to the former. See *Kempland* v. *Macauley*, Peake, 65; *Bradley* v. *Wyndham*, 1 Wils. 44. Although the former writ was not delivered with any fraudu-

lent intent or purpose to protect the goods of the debtor. *Hunt* v. *Hooper*, 12 Mees. & W. 664; S. C., 1 Dowl. & L. 626.

Where a third person, after execution issued, pays off a mortgage given by the judgment debtor, and takes possession of the goods and sells them, they will still be subject to the execution. The satisfaction of the mortgage by the third party is held not to invest him with any interest in the mortgage debt or the mortgaged property. *Woods* v. *Gilson*, 17 Ill. 218.

It was held in Alabama that, if a sheriff, having in his hands an attachment at law, receives a writ of seizure issued by the court of chancery, before he has levied the attachment, he can only execute the chancery process, unless he can find property not embraced in the writ of seizure, on which to levy the attachment. *Read* v. *Sprague*, 34 Ala. 101. See *Paradise* v. *Farmers, etc., Bank*, 5 La. Ann. 710.

# CHAPTER XVI.

## CUSTOM, ETC.

### ARTICLE I.

#### OF CUSTOMS IN GENERAL.

**Section 1. Definition and nature.** Custom is such a usage as by common consent and uniform practice has become the law of the place, or of the subject-matter to which it relates. 1 Bouv. Dict. 417. *Custom* is the thing to be proved, and *usage* is the evidence of the custom. *Read* v. *Rann*, 10 Barn. & C. 440. General customs are such as constitute a part of the common law, and extend to the whole country. Particular customs are those which are confined to a particular district. *Bodfish* v. *Fox*, 23 Me. 90; *Sleght* v. *Hartshorne*, 2 Johns. 531; *Sipperly* v. *Stewart*, 50 Barb. 62; *Duguid* v. *Edwards*, id. 288. There seems to be this difference between a custom, general or local, and a usage of trade. Customs, general or local, become laws from *immemorial* and universal acquiescence, either in a neighborhood affected, or in the entire community to be affected (*Commonwealth* v. *Mayloy*, 57 Penn. St. 291); but it is sufficient for a usage of trade, if it be established, known, certain, uniform, reasonable and legal. *Townsend* v. *Whitby*, 5 Harr. (Del.) 55. See, also, *Smith* v. *Gibbs*, 44 N. H. 335; *Murray* v. *Spencer*, 24 Md. 520; *Shackleford* v. *New Orleans, etc., R. R. Co.*, 37 Miss. 202; *Randall* v. *Smith*, 63 Me. 105; S. C., 18 Am. Rep. 200. Vol. 1, pp. 127, 129, 228; vol. 2, p. 687.

A custom to be binding must be an *established* one, and not merely casual. It must be uniform and unvarying; general, and not partial or personal. *Bartlett* v. *Pentland*, 10 B. & C. 760, 770; *Wood* v. *Wood*, 1 Car. & P. 59; *Stevens* v. *Reeves*, 9 Pick. 197; *Martin* v. *Delaware Ins. Co.*, 2 Wash. (C. C.) 254. And as a general rule, a person is not bound by a custom unless he has personal knowledge thereof (*Walsh* v. *Mississippi, etc., Co.*, 52 Mo. 434); but when it is shown that the custom is ancient, very general and well known, there will frequently be a presumption of law that the party had knowledge of it. Id.; *Sutton* v. *Tatham*, 10 Ad. & El. 27; *Loud* v. *Hall*, 106 Mass. 404; *Porter* v. *Hills*, 114 id. 106; *Ober* v. *Carson*, 62 Mo. 209; *Pollock*

v. *Stables*, 12 Q. B. 765; *Saint* v. *Smith*, 1 Coldw. (Tenn.) 51; *Walker* v. *Barron*, 6 Minn. 508; *Foye* v. *Leighton*, 22 N. H. 71.

A usage may be general and still confined to a particular city, district, town or village (*Perkins* v. *Jordon*, 35 Me. 23; *Thompson* v. *Hamilton*, 12 Pick. 426; *Commonwealth* v. *Mayloy*, 57 Penn. St. 291); evidence of the general usage of a single town, etc., is, therefore, admissible. *Gleason* v. *Walsh*, 43 Me. 397.

§ 2. **Validity.** In order to give validity to a custom, it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption. *Tyson* v. *Smith*, 9 Ad. & El. 421. See, also, *Cope* v. *Dodd*, 13 Penn. St. 33; *Sawtelle* v. *Drew*, 122 Mass. 228; *The Paragon*, Ware, 322. And a custom which is unreasonable, uncertain and which savors too much of arbitrary power, is void. *Wilkes* v. *Broadbent*, 1 Wils. 63. So, where a custom is opposed to a well-settled rule of law, and is calculated and intended to violate such law, the custom will not be allowed to have any effect. *Green* v. *Tyler*, 39 Penn. St. 361; *Delaplaine* v. *Crenshaw*, 15 Gratt. (Va.) 457. Nor is a custom legal if contrary to morality, religion and the law of the land; but is unreasonable, and therefore not compulsory (*Holmes* v. *Johnson*, 42 Penn. St. 159); and so, of a custom that has a tendency to tempt parties to acts of wrong-doing, bad faith, or dishonesty. *Lehman* v. *Marshall*, 47 Ala. 362. A custom to take any thing from another's land, or for a profit *a prendre*, is not a lawful custom (*Littlefield* v. *Maxwell*, 31 Me. 134; *Lufkin* v. *Haskell*, 3 Pick. 356; *Kenyon* v. *Nichols*, 1 R. I. 106); however ancient, uniform and clear the exercise of that custom may be. *Attorney-General* v. *Mathias*, 4 Kay & J. 579. Thus, a custom to take fish, or to take sand to mix with lime for the purpose of making mortar, *in alieno solo*, is void. *Waters* v. *Lilley*, 4 Pick. 145; *Perley* v. *Langley*, 7 N. H. 233; *Lloyd* v. *Jones*, 6 C. B. 81. Sea-weed thrown up upon the shore belongs to the owner of the adjoining land, and, therefore, a customary right in all the citizens of the State to take sea-weed cannot be sustained. *Kenyon* v. *Nichols*, 1 R. I. 106. But a custom for the inhabitants of a town to haul sea-weed from the margin of the water and deposit it upon the close of the plaintiffs, and afterward haul it away when convenient, was held not to be void as being unreasonable. *Knowles* v. *Dow*, 22 N. H. 387. And a right in the inhabitants of a township to enter upon the land of a private individual and take water from a well therein for domestic purposes, is a mere easement, and not a profit *a prendre*, and may therefore be properly claimed by custom. *Race* v. *Ward*, 4 El. & Bl. 702.

A custom for all the inhabitants of a parish to play at all kinds of law-

ful games, sports and pastimes in the close of A, at all seasonable times of the year, at their free will and pleasure, is good. *Fitch* v. *Rawling*, 2 H. Bla. 393. See *Dyce* v. *Hay*, 1 Macq. H. L. Cas. 305. So, it is held that a custom for the freemen and citizens of a town, on *a particular day in the year*, to enter upon a close for the purpose of holding horse-racing thereon, is a good custom. *Mounsey* v. *Ismay*, 1 H. & C. 729. And see S. C., 3 id. 485, 495. But a custom for the inhabitants of a parish to exercise and train horses at *all seasonable times of the year*, in land beyond the limits of the parish, is bad. *Sowerby* v. *Coleman*, L. R., 2 Exch. 96.

A custom among the inhabitants on the Connecticut river, that when one of them has cleared a place for seine fishing, he shall hold it against everybody during the fishing season, is held to be unreasonable and void. *Freary* v. *Cooke*, 14 Mass. 488. See Vol. 3, pp. 355–367.

Where a boat's crew from a whaleship A pursued and struck a whale in the Arctic ocean, and a harpoon, with the line attached to it, remained in the whale, but did not remain fast to the boat, and a boat's crew from ship B continued the pursuit and captured the whale, and the master of ship A claimed it on the spot, it was held that an admitted usage that the whale should belong to ship A, under such circumstances, was a valid usage. *Swift* v. *Gifford*, 2 Low. Dec. 110.

§ 3. **Its effect upon contracts generally.** With respect to contracts, the true office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their engagements arising, not from express stipulation, but from mere implications and presumptions and acts of a doubtful or equivocal character (*The Schooner Reeside*, 2 Sumn. [C. C.] 569); or to ascertain the true meaning of particular words in an instrument, where those words have various senses (Id.; *Eaton* v. *Smith*, 20 Pick. 150; *Cuthbert* v. *Cumming*, 10 Exch. 809; S. C. affirmed, 11 id. 405; *Lawrence* v. *McGregor*, 5 Ohio, 311; *Sampson* v. *Gazzam*, 6 Port. [Ala.] 123; *Muncey* v. *Dennis*, 1 Hurl. & N. 216); and custom or usage is sometimes admissible to add new terms not expressed in or covered by the writing. *Alabama, etc., R. R. Co.* v. *Kidd*, 29 Ala. 221. But no usage of trade, or custom, however general, can be set up in contravention of the express terms of a contract (*Yates* v. *Pym*, 6 Taunt. 446; *Collender* v. *Dinsmore*, 55 N. Y. [10 Sick.] 200; S. C., 14 Am. Rep. 224; *Meaher* v. *Lufkin*, 21 Tex. 383; *Atkinson* v. *Allen*, 29 Ind. 375; *George* v. *Bartlett*, 22 N. H. 496; *Sandford* v. *Rawlings*, 43 Ill. 92; *Cooper* v. *Purvis*, 1 Jones' [N. C.] L. 141; *Brown* v. *Foster*, 113 Mass. 136; S. C., 18 Am. Rep. 463; *Barlow* v. *Lambert*, 28 Ala. 704; *Leach* v. *Beardslee*, 22 Conn. 404); and in order to

vary the ordinary meaning of plain words in a contract, as to make the word "cash" mean "credit," the evidence must show a special custom precise, definite and universal where it exists. *Steward* v. *Scudder*, 24 N. J. Law, 96. See, also, *Chapman* v. *Devereux*, 32 Vt. 616. And it is not competent to show that words used in a written contract, which have received a judicial interpretation, have acquired, by the usage of trade, a commercial meaning variant from, or in conflict with, that which the courts have adjudged to be their true meaning. *Bargett* v. *Orient Mut. Ins. Co.*, 3 Bosw. (N. Y.) 385; *Security Bank* v. *National Bank*, 67 N. Y. (22 Sick.) 458; S. C., 23 Am. Rep. 129. It is, however, held, that evidence of usage may be admissible in relation to a mercantile contract in writing, to show in what manner the business is done, although the contract is precise in its terms. *Fox* v. *Parker*, 44 Barb. 541.

It is a general rule, that parties are presumed to contract in reference to a uniform, continuous and well-settled usage pertaining to the matters as to which they enter into agreements, where such usage is not in opposition to well-settled principles of law and is not unreasonable. *Lyon* v. *Culbertson*, 83 Ill. 33; *Stevens* v. *Reeves*, 9 Pick. 197; *Martin* v. *Maynard*, 16 N. H. 165; *Kendall* v. *Russell*, 5 Dana (Ky.), 501; *Carter* v. *Philadelphia Coal Co.*, 77 Penn. St. 286; *Miller* v. *Burke*, 68 N. Y. (23 Sick.) 615. But where the usage is of a particular trade or locality, such presumption is not conclusive and may be rebutted by proof upon the part of one of the contracting parties that he was ignorant of such usage. *Walls* v. *Bailey*, 49 N. Y. (4 Sick.) 464; S. C., 10 Am. Rep. 407; *Sawtelle* v. *Drew*, 122 Mass. 228; *Hill* v. *Hibernia Ins. Co.*, 10 Hun (N. Y.), 26; *Goodnow* v. *Parsons*, 36 Vt. 46; *Wadley* v. *Davis*, 63 Barb. 500. If a usage be adopted by implied or tacit understanding, it is as obligatory upon the parties as if incorporated with the contract itself, provided the usage be not repugnant to or inconsistent with the terms of the contract, or in contravention of existing rules of law. *Appleman* v. *Fisher*, 34 Md. 540; *Stultz* v. *Dickey*, 5 Binn. (Penn.) 287; *Brown* v. *Byrne*, 3 El. & Bl. 713. See, also, *Hursh* v. *North*, 40 Penn. St. 241; *Barber* v. *Brace*, 3 Conn. 9; *Inglebright* v. *Hammond*, 19 Ohio, 337; *Munn* v. *Burch*, 25 Ill. 35; *Power* v. *Kane*, 5 Wis. 265; *ante*, p. 621, § 1. And however local and partial a usage may be, it will govern a contract proved or presumed to have been made in reference to it. *Gabay* v. *Lloyd*, 3 Barn. & C. 793; *Foley* v. *Mason*, 6 Md. 50; *Appleman* v. *Fisher*, 34 id. 540. But it is to be observed as a general rule that in order that the contract may be regarded as having been made with reference to a

usage of trade, such usage must be certain, general, known, reasonable and not repugnant to the contract, or the rules of law. *Randall* v. *Smith*, 63 Me. 105; S. C., 18 Am. Rep. 200; *Chenery* v. *Goodrich*, 106 Mass. 566; *Lyon* v. *Culbertson*, 83 Ill. 33; and see the cases cited, *ante*, p. 624.

§ 4. **Effect upon commercial paper.** The allowance of days of grace, on a bill or note, is a custom of merchants. But it is established by a usage so general, so long continued, so pervading the whole commercial world, that it is universally understood to enter into every bill or note of a mercantile character, and to form so completely a part of the contract that the bill or note does not become due, in fact or in law, on the day mentioned on its face, but on the last day of grace (*Bank of Washington* v. *Triplet*, 1 Pet. [U. S.] 30; *Bodfish* v. *Fox*, 23 Me. 90; Vol. 1, tit. *Bills and Notes*); and evidence of local usage cannot be received to the contrary. *Merchants' Bank* v. *Woodruff*, 6 Hill, 174.

The usage of depositors in certain banks to deposit a check on, or the next day after the day on which it was received, and of the bank immediately to return any checks from the "clearing house" which the bank has not funds to cover, is held to be well established and reasonable. *Marrett* v. *Brackett*, 60 Me. 524. But such association cannot be held to have power to make usages or rules to bind those who are not parties to its organization. And those who are not bound by such usages, and have not contracted with reference to them, have no right to avail themselves of them to create an obligation against those who are parties to their adoption, and bound by them as between themselves only. *Overman* v. *Hoboken City Bank*, 30 N. J. Law, 61.

A custom usually prevailing among a class of men who have a special legal function to perform, cannot be allowed to control the rules of law in respect to commercial paper, nor make that a valid demand which the law declares not to be valid. Hence, evidence cannot be introduced to show that notaries in the city of New York, in their protests and registers usually state a demand made upon a firm, to have been made upon one of the firm, without naming which. *Otsego County Bank* v. *Warren*, 18 Barb. 291.

Where a bank had kept posted a notice that all indorsers of notes to the bank would be required to waive demand and notice, and a note was indorsed to the bank by one who had been for several years a customer of the bank, but no such waiver was written upon the note, it was held that parol evidence of this usage of the bank, and of the assent of the indorser, could not be shown to change the contract im-

plied in law from the indorsement. *Piscataqua Exchange Bank* v. *Carter*, 20 N. H. 246.

Where a note was made payable "in cotton yarn, at the wholesale factory prices," evidence was admitted to show that, by the usage of manufacturers, those terms meant a certain scale of prices different from the actual wholesale prices in market. *Avery* v. *Stewart*, 2 Conn. 69.

§ 5. **Bills of lading.** See Vol. 1, tit. *Bills of Lading.* A bill of lading is a special contract, and as a general rule, is not to be varied or altered by parol evidence. Usage will not be permitted to control the terms used, unless it is established by clear and satisfactory proof. *Wayne* v. *Steamboat General Pike*, 16 Ohio, 421. Evidence of usage, fixing a construction of the words "inevitable dangers of the river," in a bill of lading for transportation of goods by inland navigation, was admitted in *Gordon* v. *Little*, 8 Serg. & R. (Penn.) 533. So, the words, "on the steamer," in the bill of lading, may be explained by parol proof of a general usage by which steamboats have barges in tow, at certain stages of water, and lade their goods on the barges. *Hibler* v. *McCartney*, 31 Ala. 501; *McClure* v. *Cox*, 32 id. 617. And evidence of usage was held to be admissible to show that the term "days" in a bill of lading meant "working days." *Cochran* v. *Retberg*, 3 Esp. 121. But it was held that evidence is not admissible to vary the common bill of lading, by which the goods were to be delivered in good order and condition, the danger of the seas only excepted, by establishing a custom that the owners of packet vessels between New York and Boston should be liable only for damage to goods occasioned by their own neglect. *The Schooner Reeside*, 2 Sumn. (C. C.) 569. And from a custom in a city whence a cargo of grain is shipped, that the bill of lading shall not be detached from the draft until its payment, a jury cannot presume that such a usage of trade exists in a neighboring city, to which the cargo is consigned. *Mears* v. *Waples*, 3 Houst. (Del.) 581; S. C. affirmed, 4 id. 62.

A custom to deliver bills of lading only to the holders of shipping receipts, was held to be reasonable, as tending to the protection of both the shipper and the ship-owner. *Blossom* v. *Champion*, 37 Barb. 554.

§ 6. **Sales.** In an action for goods sold and delivered, the usages of trade, as to the goods in question, are competent evidence. *Mixer* v. *Coburn*, 11 Metc. 559; *Farnsworth* v. *Chase*, 19 N. H. 534; *Barton* v. *McKelway*, 22 N. J. Law, 165. But proof of a usage repugnant to the terms of a contract of sale, or inconsistent with the rules of the common law, is inadmissible to control the contract. *Boardman* v.

*Spooner*, 13 Allen, 353. Thus, a usage that no title passes upon an ordinary sale and delivery, without actual payment of the consideration within a certain number of days, is held to be unreasonable and invalid. *Haskins* v. *Warren*, 115 Mass. 514. And a custom to treat a sale on thirty days as a sale for cash is void. *Chapman* v. *Devereux*, 32 Vt. 616.

If a custom to fill orders *pro rata*, and in the order in which they are received as fast as the articles can be manufactured, is well known to the vendee from his previous dealings with the vendor, the contract is presumed to embrace that custom, and the vendee cannot complain that the articles are not sooner delivered. *Bliven* v. *New England Screw Co.*, 23 How. (U. S.) 420. Where there is a contract for the delivery of shingles by the thousand, it may be shown that by the general, well-established, and known custom of the trade, two bundles of a certain size represent a thousand; and when such custom is shown, the parties will be presumed to have contracted with reference to it. *Soutier* v. *Kellerman*, 18 Mo. 509. And see *Lee* v. *Kilburn*, 3 Gray, 594. In an action upon an agreement to sell a milk-route and the good-will thereof, the testimony of experts is admissible to show a usage, in the milk trade, of selling such routes by the can, and also the recognized value thereof per can. *Page* v. *Cole*, 120 Mass. 37. So, it is held that evidence of a custom of manufacturers of iron castings to warrant the quality of the articles made by them, without an express contract to that effect, is admissible in an action founded on such supposed warranty. *Sumner* v. *Tyson*, 20 N. H. 384. But, if manufactured goods are sold by sample, by a merchant who is not a manufacturer, and both the sample and the bulk of the goods contain a latent defect, there is no implied warranty against the defect, and evidence is inadmissible to show that by the usage of merchants the seller is responsible therefor. *Dickinson* v. *Gay*, 7 Allen, 29. But see *Snowden* v. *Warder*, 3 Rawle, 101.

It is held in Pennsylvania, that the custom among the merchants of Pittsburgh, of charging interest on accounts after six months, having existed for a long time, and become uniform and notorious, the courts of justice are bound to notice it as part of the law. *Watt* v. *Hoch*, 25 Penn. St. 411. And see *Searson* v. *Heyward*, 1 Spears (S. C.), 249.

The words "six per cent. off for cash," indorsed on a bill of goods, being equivocal, it may be shown to the jury how they are understood by a custom or usage among men engaged in the same class of trade. *Linsley* v. *Lovely*, 26 Vt. 123.

§ 7. **Insurance policies.** A usage may be shown for the purpose of explaining a clause of doubtful construction in a policy of insurance,

usage being, in such case, the safest guide to the intention of the parties. Thus, evidence is admissible to show whether, according to the usage of insurance companies, the word "cargo," in an order for insurance, is considered as covering live stock. *Allegre* v. *Maryland Ins. Co.*, 2 Gill & J. 136. But usage can be resorted to only when the law is doubtful and unsettled. Id.; *Coit* v. *Commercial Ins. Co.*, 7 Johns. 385; *Winthrop* v. *Union Ins. Co.*, 2 Wash. (C. C.) 7. And evidence of a local custom among insurers, not communicated to the insured, nor of such notoriety as to afford any presumption of knowledge on his part, is not admissible. *Hartford, etc., Ins. Co.* v. *Harmer*, 2 Ohio St. 452; *Rogers* v. *Mechanics' Ins. Co.*, 1 Story (C. C.), 603. Nor is a usage of short continuance entitled to any weight in the explanation of an insurance contract. *Wall* v. *East River Ins. Co.*, 3 Duer (N. Y.), 264. See *Fulton Ins. Co.* v. *Milner*, 23 Ala. 420. Where a policy of insurance provides in unambiguous terms for an indemnity to the re-insured, evidence of a local custom among insurers, to pay only such a proportion of the loss as the amount of re-insurance bears to the original policy, cannot be received to control the contract, or reduce the amount of a recovery thereon. *Mutual Safety Ins. Co.* v. *Hone*, 2 N. Y. (2 Comst.) 235.

In an action on a policy of insurance, which had been filled up and signed, but not delivered, and on which no premium had been paid, evidence of usage that such policies are considered as held for the benefit of the insured is admissible. *Baxter* v. *Massasoit Ins. Co.*, 13 Allen, 320. So, in such an action, it was permitted to prove a custom exempting the assured from providing a branch pilot in a certain coasting trade in which the vessel insured was employed (*Cox* v. *Charleston, etc., Ins. Co.*, 3 Rich. [S. C.] 331), and it may be shown, in such an action, that it is the usage of commission merchants, in a certain place, to effect insurance on goods consigned to them for sale, without any express orders from consignors. *DeForest* v. *Fulton Fire Ins. Co.*, 1 Hall (N. Y.), 84. And a commercial usage of long standing, such as that of adding the premiums to the invoice value, in cases of insurance, may be modified and controlled by a local usage, well sustained by proof, and shown by positive testimony, or by circumstances, to be known to the other party. *Merchants' Mut. Ins. Co.* v. *Wilson*, 2 Md. 217.

It is not necessary that a usage of trade relied on to explain an insurance policy should be shown to have been known to the insurers. Every underwriter is presumed to be acquainted with the usage of the trade he insures, and if he does not know it, he ought to inform him-

self. *Noble* v. *Kennoway*, 2 Doug. 513; *Hearne* v. *Marine Ins. Co.*, 20 Wall. 488.

§ 8. **Principal and agent.** No usage will authorize a factor or agent to depart from positive instructions. *Barksdale* v. *Brown*, 1 Nott & M. (S. C.) 517. And where, by the terms of a written contract, commission merchants are to charge a specified commission on sales, which is to be in full of all expenses, and at the termination of the contract by mutual consent, the goods on hand are transferred to other factors, evidence is incompetent to prove a usage of merchants to charge one-half commission under such circumstances. *Ware* v. *Hayward Rubber Co.*, 3 Allen, 84. Evidence of a custom among brokers, to sell the stock of their principals upon a failure to repay advances, is not admissible to vary the terms of a contract (*Taylor* v. *Ketchum*, 35 How. [N. Y.] 289; S. C., 5 Robt. 507), and the practice of brokers to sell stock hypothecated, and return the same kind of stock on the payment of the instrument for which it was hypothecated, is inadmissible. *Allen* v. *Dykers*, 3 Hill, 593. Where goods are consigned to a merchant to sell, and he consigns them to another to sell, a custom for each merchant to charge the commission usually charged for a sale is void, as being against reason and justice. *Burton* v. *Blin*, 23 Vt. 151.

In an action by a life insurance agent to establish his right to future premiums to accrue after his discharge, he put in evidence a letter from the company telling him that "you are working up a business for yourself, and are paid the highest commissions," etc., it was held that parol evidence was inadmissible in his behalf to show that by usage these words meant that he was to have the right to collect and take commissions on policies, issued through him, for their whole life, without reference to his discharge. *Partridge* v. *Insurance Co.*, 15 Wall. 573. And see *Stagg* v. *Insurance Co.*, 10 id. 589. But, in an action on a promise to pay commissions to an insurance agent, evidence of a usage or custom of trade to pay commissions only on premiums actually collected is admissible. *Miller* v. *Ins. Co. of North America*, 1 Abb. New Cas. (N. Y.) 470.

If the usage is clearly established, that the factor has a right to charge commissions on purchases, and on acceptances, when not in funds to meet drafts at maturity, such items ought to be allowed. But commissions and interest both cannot be charged on advances. *Smetz* v. *Kennedy*, Riley (S. C.), 218. See Vol. 3, tit. *Factors*, etc. A usage of the different departments of the government to allow commissions to the officers of government upon disbursements of money under a special authority, not connected with their regular official duties, may

be proved, for the purpose of establishing the measure of such officers' compensation. *United States* v. *Fillebrown*, 7 Pet. (U. S.) 50.

A custom, according to which, among agents employed in the business of insuring for others, the former are entitled to all dividends declared by mutual companies, in lieu of all other compensation for effecting such insurance, is in contravention of the well-settled principle of law, that an agent cannot appropriate to his own use any portion of the profits arising from the business of the agency, and therefore invalid. *Minnesota, etc., Railway Co.* v. *Morgan*, 52 Barb. 217; S. C. affirmed, 6 Alb. L. J. 173.

§ 9. **Landlord and tenant.** Every demise between landlord and tenant, in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage or custom of the country, or of the district where the land lies (*Van Ness* v. *Pacard*, 2 Pet. [U. S.] 138; *Wilkins* v. *Wood*, 12 Jur. 583; S. C., 17 Law Jour., Q. B. 319); and every person, under such circumstances, is supposed to be cognizant of the custom and to contract with reference to it. Id.; *Stultz* v. *Dickey*, 5 Binn. (Penn.) 287. But if the meaning of the contract is certain and beyond doubt, usage cannot be admitted to vary or contradict it. *Iddings* v. *Nagle*, 2 Watts & Serg. 22; *Cooke* v. *England*, 27 Md. 14. And where a tenant covenanted on quitting the land, not to sell or take away the manure, but to leave it to be expended by the succeeding tenant, it was held to exclude the custom of the country, by which the outgoing tenant was bound to leave the manure and was entitled to be paid for it. *Roberts* v. *Barker*, 1 Cr. & M. 808; 3 Tyrwh. 945.

A custom that tenants, whether by parol or deed, shall have the away-going crop after the expiration of their terms, is good (*Wigglesworth* v. *Dallison*, 1 Doug. 201; *Van Doren* v. *Everitt*, 2 South [N. J.], 460; *Templeman* v. *Biddle*, 1 Harr. [Del.] 522; *Foster* v. *Robinson*, 6 Ohio St. 90; *Biggs* v. *Brown*, 2 Serg. & R. [Penn.] 14); and, in this respect, no difference has been established between a tenant who pays a rent in money, and one who pays a share of the produce of the farm. *Demi* v. *Bossler*, 1 Penr. & W. (Penn.) 224. So, a custom, that a tenant may leave his away-going crop in the barn of the farm after he has quitted the premises, is good. *Beavan* v. *Delahay*, 1 H. Bla. 5. See Vol. 4, pp. 252–254.

In Delaware, an incoming tenant has a right, from custom and necessity, to enter before his term commences and fill the ice-house on the demised premises. *State* v. *McClay*, 1 Harr. (Del.) 520.

And proof is held to be admissible of a local custom, that a lease from the first day of May in one year, to the first day of May in a suc-

ceeding year, expires at noon of the last day. *Wilcox* v. *Wood*, 9 Wend. 346. In an action for the breach of an agreement in writing to hire the plaintiff's house, where the defense was that the plaintiff failed to cleanse the house as he agreed, evidence "that a universal custom and usage prevailed in the locality in which said house was situated, by force of which a lessor was required to cleanse a leased house before the lessee entered into possession of it," is inadmissible, in the absence of evidence that the plaintiff knew of such custom and usage. *Sawtelle* v. *Drew*, 122 Mass. 228.

§ 10. **Contracts for services.** It has been laid down as a general rule, that, in the absence of evidence of a special contract, where services are rendered and a uniform usage is shown to exist in regard to such services, it will be presumed that they are rendered in accordance with the usage; and in an action to recover for such services, evidence of the existence of the usage is admissible. *Given* v. *Charron*, 15 Md. 502; *Lyon* v. *George*, 44 id. 295; *Sewell* v. *Corp*, 1 Carr. & P. 392. So, on a question involving the performance of the duties of a particular service, evidence of the customary duties of such service is admissible. *Vaughn* v. *Gardner*, 7 B. Monr. (Ky.) 326. All trades have their usages; and when a contract is made with a man about the business of his craft, it is framed on the basis of its usage, which becomes part of the contract except when its place is occupied by particular stipulations. *Mayor, etc., of Pittsburgh* v. *O'Neill*, 1 Penn. St. 342; *Carter* v. *Philadelphia Coal Co.*, 77 id. 286. But the rule as established by the New York cases is that evidence of usage in paying for services, unaccompanied by, and independent of evidence to charge the plaintiff with notice of such usage, is inadmissible to affect the plaintiff's claim for services (*Flynn* v. *Murphy*, 2 E. D. Smith [N. Y.], 378); unless the usage had been so long continued, universal and notorious, that all may be presumed to have had notice of it. *Wadley* v. *Davis*, 63 Barb. 501; *Boardman* v. *Gaillard*, 1 Hun (N. Y.), 217; S. C., 3 N. Y. Sup. Ct. (T. & C.) 695; S. C. affirmed, 60 N. Y. (15 Sick.) 614; *ante*, p. 624, § 3. And where the question was, whether furniture was sold by a contract as to its price, proof that, under the regulations of cabinet workers, workmen could not be employed to manufacture such furniture except by the day, was held not to be admissible against a purchaser having no notice of such regulations. *Butterworth* v. *Volkening*, 4 N. Y. Sup. Ct. (T. & C.) 650.

In a contract to furnish and lay up brick at so much per thousand, the controversy was as to the proper mode of counting; and evidence of a local usage, to estimate the measurement of the walls, on a uniform rule, based on the average size of brick, making slight additions

for extra work and wastage, deducting for openings in the wall, but not for openings in chimneys, nor jambs, nor for caps, sills nor lintels, was admitted as not unreasonable. *Lowe* v. *Lehman*, 15 Ohio St. 179. Where the contract was to build an octagonal cellar wall at a certain price by the foot, and a dispute arose as to the mode of measurement, it was held that the agreement as to the compensation was equivocal and obscure, and that it was competent to prove a local usage of measuring cellar walls, in order to interpret the meaning of the language, and to ascertain the extent of the contract. *Ford* v. *Tirrell*, 9 Gray, 401. And see *Walls* v. *Bailey*, 49 N. Y. (4 Sick.) 464; S. C., 10 Am. Rep. 407. So in a contract to deliver certain trees from a nursery, not to be less than one foot high, a dispute arose as to the measurement; and evidence was held to be competent, of a usage in that trade, to measure only to the top of the ripe, hard wood, and not to the top of the tree. *Barton* v. *McKelway*, 22 N. J. Law, 165. See, also, *Grant* v. *Maddox*, 15 M. & W. 737; *Wilcox* v. *Wood*, 9 Wend. 346. But it was held that a custom of plasterers to charge half the size of the windows at the price agreed on, when that price includes the cost of materials, is unreasonable and void. *Jordan* v. *Meredith*, 3 Yeates (Penn.), 318.

To allow a mechanic or artisan, who works up the materials of another, to keep so much of such material as is not used for the benefit of the owner of the material, is to array his interests in direct opposition to those of his employer. Such a custom, binding upon the owner of the property, is unreasonable, contrary to public policy, and cannot have the sanction of law. It is therefore held that a custom to the effect that a person employed to cut staves from another's bolts has a right to take, and appropriate to his own use, not only the clippings and corner pieces, but the culls, without the consent or agreement of the owner, cannot be sustained. *Wadley* v. *Davis*, 63 Barb. 500.

A usage among printers and booksellers, that a printer contracting to print for a bookseller a certain number of copies shall not print with the same types, while standing, an extra number for his own use, is held to be reasonable, and not in restraint of trade. *Williams* v. *Gilman*, 3 Me. 276.

Where a contract fixes the price of work and in terms provides that no extras shall be allowed, a custom to the contrary cannot control the express stipulation of the parties. *Phillips* v. *Starr*, 26 Iowa, 349. And see *Bedford* v. *Flowers*, 11 Humph. (Tenn.) 242; *Bogert* v. *Cauman*, Anth. (N. Y.) 97. And it was held in Massachusetts that a written contract for the manufacture of retorts cannot be affected by

proof of a custom that, in the absence of an express agreement, founders shall not be held to warrant their castings against latent defects; and that, in case of apparent defects, they shall be entitled to have the castings returned to them within a reasonable time, and to replace them with new ones. *Whitmore* v. *South Boston Iron Co.*, 2 Allen, 52.

Where a usage, regulating the compensation to be paid for a particular description of personal services, has been proved, it is for the court to say, whether the usage is or is not reasonable. *Bodfish* v. *Fox*, 23 Me. 90, or what effect, if any, it shall have. *Given* v. *Charron*, 15 Md. 502. And see *Wilson* v. *Bauman*, 80 Ill. 493.

§ 11. **Affreightment.** A shipper of goods is chargeable with notice of an established and well-known usage, existing in a particular trade, in regard to the stowage of a general ship, both as to the manner of stowing, and as to the different articles to be stowed together. And if the shipper, in such case, gives no special instructions, and his goods are stowed in conformity with such usage, he is deemed to have assented to such mode of stowage, and cannot, in case his goods are injured on the voyage, in consequence of the mode of stowage, set that up as a ground of complaint or as a foundation for depriving the owners of their freight. *Baxter* v. *Leland*, 1 Blatchf. (C. C.) 526. See, also, *Outwater* v. *Nelson*, 20 Barb. 29; *Barber* v. *Brace*, 3 Conn. 9; *The Fanny Fosdick*, 4 Blatchf. (C. C.) 374. But a local custom at one port, regulating the mode of delivering goods there, is not binding on shippers at another port, unless known to them. *The Albatross* v. *Wayne*, 16 Ohio, 513. See *ante*, p. 626, § 5.

§ 12. **Carriage of goods.** That a custom or usage will control the general law of the liability of carriers is well settled. See *Farmers', etc., Bank* v. *Champlain Transp. Co.*, 23 Vt. 186; *McClure* v. *Cox*, 32 Ala. 617; *Cox* v. *Peterson*, 30 id. 608; Vol. 1, p. 50. Thus, a custom that a railroad company should deliver freight on the platform of minor stations, whose business would not justify a warehouse, etc., to be received there by the consignee on discharge from the car, is held to be a good custom, and to control the general law of liability of carriers in the neighborhood. *McMasters* v. *Penn. R. R. Co.*, 69 Penn. St. 374; S. C., 8 Am. Rep. 264. But if all the railroads in the country adopt a rule or custom which is unreasonable or dangerous and productive of injury, the generality of the custom cannot in any degree excuse an act in conformity to it. *Hill* v. *Portland, etc., R. R. Co.*, 55 Me. 438.

A usage of a port that, in order to constitute a delivery of waterborne goods by the carrier, it is necessary for a receipt to be given by

the consignee or his agent, and that until then the liability of the carrier continues, is held to be unreasonable and illegal. *Reed* v. *Richardson*, 98 Mass. 216. Usage cannot prescribe or determine that acts, which the law declares to be a delivery, shall not be sufficient to constitute it. Id. And a local custom, that ship-owners shall be liable for the negligence of their agents in cases in which they are exempted by statute, is invalid. *Walker* v. *Transportation Co.*, 3 Wall. 150.

In an action against a ferryman for the loss of a horse and wagon by his neglect to put up the chain at the end of his boat, he cannot give in evidence a custom at other ferries on the same river to put up the chain at the request of passengers and not otherwise. *Miller* v. *Pendleton*, 8 Gray, 547.

When a shipper and a carrier of goods have entered into a valid contract, the one to load the other's vessel with a cargo of coal at a specified port and to pay freight at a certain rate per ton, and the other to carry such cargo to the place of contract for that price, a practice among persons engaged in that kind of business at such place of contract, to treat such contract as binding upon the parties only as might suit the convenience of either of them, cannot be upheld as a commercial usage to affect such written contract, because of its repugnancy thereto, and to the principles of law. *Randall* v. *Smith*, 63 Me. 105; S. C., 18 Am. Rep. 200. In a recent English case, the defendants, acting as agents for one L., chartered a ship for the conveyance of a cargo of currants from the Ionian Islands. The charter-party was expressed to be made and was signed by the defendants, as "agents to merchants," the name of the principal not being disclosed. In an action by the ship-owners against the defendants upon the charter-party, evidence was held to be admissible of a trade usage, by which, if the name of the principal is not disclosed within a reasonable time, the agents themselves are personally liable. *Hutchinson* v. *Tatham*, L. R., 8 C. P. 482; S. C., 6 Eng. R. 230. See, also, *Fleet* v. *Murton*, L. R., 7 Q. B. 126; S. C., 1 Eng. R. 32; *Dale* v. *Humfrey*, El. Bl. & El. 1004.

A local custom among cotton dealers making a warehouse receipt transferable by delivery without indorsement, and such mere transfer to pass the cotton, unless notice is given that a receipt has been lost, or got into the hands of some one not entitled to hold it, is not a good custom. *Lehman* v. *Marshall*, 47 Ala. 362. So, a regulation requiring a consignee to receipt for grain weighed into a delivery bin, before taking the same from such bin, and before he can ascertain, except from the defendant's statement, whether the quantity of grain receipted

for is there or not, is held to be unreasonable and void. *Christian* v. *First Division St. Paul, etc., R. R. Co.*, 20 Minn. 21.

§ 13. **Rules of law.** We have seen, *ante*, p. 622, § 2, that a usage cannot be sustained in opposition to well-established principles of law. To sustain a usage under such circumstances would be extremely pernicious in its consequences, and render vague and uncertain all the rules of law. *Thompson* v. *Ashton*, 14 Johns. 316. A mere custom or usage is, therefore, without force, in opposition to a positive law. *Cranwell* v. *The Fanny Fosdick*, 15 La. Ann. 436; *Randall* v. *Smith*, 63 Me. 105; S. C., 18 Am. Rep. 200; *Coleman* v. *McMurdo*, 5 Rand. (Va.) 51; *Winder* v. *Blake*, 4 Jones (N. C.), 332. Thus, a usage for factors to pledge the goods of their principals is void, being against a general rule of law. *Newbold* v. *Wright*, 4 Rawle (Penn.), 195. So, of a usage for the master of a vessel to sell the cargo, without necessity, when the vessel is stranded (*Bryant* v. *Commonwealth Ins. Co.*, 6 Pick. 131); so, of a custom, different from the law, in a particular place, to re-enter for a forfeiture incurred by the non-payment of rent. *Stoever* v. *Whitman*, 6 Binn. (Penn.) 416. And it is held that the custom and understanding of the merchants in a particular trade cannot be admitted to prove that the barter or exchange of a promissory note, indorsed without recourse, for cotton or any other species of merchandise, carries with it no implied warranty of the past or future solvency of the maker of the note. *Beckwith* v. *Farnum*, 5 R. I. 230. And see *Prescott* v. *Hubbell*, 1 McCord (S. C.), 94; *Halls* v. *Howell*, Harp. (S. C.) 427; *Bowen* v. *Newell*, 8 N. Y. (4 Seld.) 190. So, where a transaction is within the statute against usury, the usage of trade as to such transaction cannot be received in evidence to show that it is not usurious. *Dunham* v. *Dey*, 13 Johns. 40; 16 id. 367; *Greene* v. *Tyler*, 39 Penn. St. 361.

But known and settled local usages ought to be respected by courts and juries, unless such usages are against the laws or policy of the country. *Wilcocks* v. *Phillips*, Wall., Jr., 47. Usage is evidence of the construction given to the law, and when it is established and uniform, it regulates the rights and duties of those who act within its limits. *United States* v. *Buchanan*, Crabbe, 563. See, also, *Governor* v. *Withers*, 5 Gratt. (Va.) 24. In doubtful cases, usage may be recurred to in order to ascertain the meaning of the legislature. *Polk* v. *Hill*, 2 Overt. (Tenn.) 157. Thus, the general custom and usage under the statutes respecting the proof and acknowledgment of deeds, and the form of the certificate of acknowledgment, have great weight in the construction of such statutes. *Meriam* v. *Harsen*, 2 Barb. Ch. 232. Evidence

of usage is, however, insufficient to *control* the legal interpretation of a statute provision. *Dwight* v. *Boston*, 12 Allen, 316.

To permit usage to govern and modify the law in relation to the dealings of parties in any case, it must be uniform, certain and sufficiently notorious to warrant the legal presumption that the parties made their contract with reference to the usage, and not according to the general and established law applicable to the case. *Citizens' Bank* v. *Grafflin*, 31 Md. 507; S. C., 1 Am. Rep. 66; *Smith* v. *Gibbs*, 44 N. H. 335; *Harper* v. *Pound*, 10 Ind. 32. And see *ante*, p. 623, § 3. Where, in the absence of any statutory provision, a rule of commercial law has been adopted by the court of last resort, in a State, the usage will henceforth be held to conform thereto throughout the State, and this can only be rebutted by clear proof of a uniform and settled local usage to the contrary. *Isham* v. *Fox*, 7 Ohio St. 317.

§ 14. **How pleaded.** A particular custom must be pleaded (*Governor* v. *Withers*, 5 Gratt. [Va.] 24); as, if there be a particular or local custom as to protesting notes on a day different from that prescribed by the law-merchant, it must be alleged. *Jackson* v. *Henderson*, 3 Leigh (Va.), 106. But if the custom be general as the custom of merchants, it need not be pleaded. *Templemen* v. *Biddle*, 1 Harr. (Del.) 522; 1 Chit. Pl. 217.

Where a local usage is set up, the averments should be such as to show that it has all the requisites of a valid usage. *Wallace* v. *Morgan*, 23 Ind. 399. And see *Dutch, etc., Co.* v. *Mooney*, 12 Cal. 534.

§ 15. **How proved.** See *ante*, 623, § 3. Usage is a matter of fact, not of opinion. A usage of trade must therefore be proved by instances, and cannot be supported by evidence of opinion merely. *Cunningham* v. *Fonblanque*, 6 Carr. & P. 44; *Garey* v. *Meagher*, 33 Ala. 630; *Chesapeake Bank* v. *Swain*, 29 Md. 483. It is proved by witnesses testifying of its existence and uniformity from their knowledge obtained by observation of what is practiced by themselves and others in the trade to which it relates. *Haskins* v. *Warren*, 115 Mass. 514; *Mills* v. *Hallock*, 2 Edw. Ch. 652. An isolated instance is not sufficient to prove a custom, nor will evidence of the custom of one person be sufficient to establish a general course of trade. *Burr* v. *Sickles*, 17 Ark. 428; *Cope* v. *Dodd*, 13 Penn. St. 33. See, also, *Adams* v. *Otterback*, 15 How. (U. S.) 539. And as a general rule, one witness is not sufficient to prove a custom. *Bissell* v. *Ryan*, 23 Ill. 566; *Halwerson* v. *Cole*, 1 Spears (S. C.), 321; *Wood* v. *Hickok*, 2 Wend. 501. But see *Partridge* v. *Forsyth*, 29 Ala. 200. A usage may, however, be proved by parol, whether it originates in a public written

law, or not. *Drake* v. *Hudson*, 7 Har. & J. (Md.) 399; *Livingston* v. *Maryland Ins. Co.*, 7 Cranch, 506.

The general law as to a custom is that if its existence at a distant time is shown, and there is no evidence that at any certain time it did not exist, a jury may infer that it went back as far as the time of legal memory. *Leuckart* v. *Cooper*, 7 Car. & P. 119; *Scales* v. *Key*, 11 Ad. & El. 819; S. C., 3 P. & D. 505.

The value of professional services may be proved by usage. But to establish such usage, it is not competent to ask a witness belonging to the profession "what he himself would have charged." The testimony must be either to the value of the services, or to the customary rule of compensation. *Pfeil* v. *Kemper*, 3 Wis. 315.

It has been held that the proof of a usage of trade involves questions both of law and fact. It is a question of law what is sufficient usage to bind the parties; that is to say, for how long a time, at what places, and with what degree of uniformity it must have been observed. Therefore, whether a given state of facts establishes the usage claimed to exist is a question for the court; whether such a state of facts has been proved is a question for the jury. And if, taking all the evidence to be true that is relied on to prove it, in the opinion of the court it is not sufficient to establish the usage contended for, it becomes their duty to so instruct the jury. *Mears* v. *Waples*, 4 Houst. (Del.) 62.

Usage has been proved to explain the meaning of the following words: "After proof and adjustment thereof", *Allegre* v. *Maryland Ins. Co.*, 6 Har. & J. (Md.) 408; "Barrels", *Miller* v. *Stevens*, 100 Mass. 518; S. C., 1 Am. Rep. 139; "Corn", *Mason* v. *Skurry*, Park on Ins. 245; "Cargo", *Allegre* v. *Maryland Ins. Co.*, 2 Gill & J. (Md.) 137; "Days," *Cochran* v. *Retberg*, 3 Esp. 121; "Day's work", *Hinton* v. *Locke*, 5 Hill, 437; "Freight", *Peisch* v. *Dickson*, 1 Mas. (C. C.) 11; "Fur", *Astor* v. *Union Ins. Co.*, 7 Cow. 202; "Inhabitant", *Rex* v. *Mashiter*, 6 Ad. & El. 153; "Level", as used by miners, *Clayton* v. *Gregson*, 5 id. 302; "Months", *Jolly* v. *Young*, 1 Esp. 186; "Inevitable dangers of the river", *Gordon* v. *Little*, 8 Serg. & R. 533; "Sea-letter", *Sleght* v. *Hartshorne*, 2 Johns. 531; "Outfits", *Macy* v. *Whaling Ins. Co.*, 9 Metc. 354; "Roots", as used in insurance policies, *Coit* v. *Commercial Ins. Co.*, 7 Johns. 385; "Salt", *Jrumee* v. *Bourdien*, Park on Ins. 245; "Thousand", *Smith* v. *Wilson*, 3 B. & Ad. 728; "Weeks", *Grant* v. *Maddox*, 15 Mees. & W. 737.

A general dictionary of the English language is no authority to show on a trial the meaning of a word, which is relied on as deriving a pecu-

liar meaning from mercantile usage. *Houghton* v. *Gilbart*, 7 Carr. & P. 701.

Evidence should be very strong and conclusive to authorize a usage to regulate and control a contract between parties in derogation of the established law. *Citizens' Bank* v. *Grafflin*, 31 Md. 507; S. C., 1 Am. Rep. 66.

# CHAPTER XVII.

## DAMAGE FEASANT.

### ARTICLE I.

#### GENERAL RULES AND PRINCIPLES.

**Section 1. In general.** *Damage feasant* is a term usually applied to the injury which animals belonging to one person do upon the land of another, by feeding there and treading down his grass, corn, or other production of the earth. 3 Bla. Comm. 6; Co. Litt. 142, 161. By the common law, a distress of animals or things, damage feasant, is allowed. It was also allowed by the ancient customs of France. But the beasts must be damage feasant at the time of the distress; and if they were damage feasant yesterday and again to-day, they can only be distrained for the damage they are doing when they are distrained. And to support the distress it must appear that the party distraining had actually got into the *locus in quo* before the cattle had got out of it *Clement* v. *Milner*, 3 Esp. 95; *Holden* v. *Torrey*, 31 Vt. 690. And if many cattle are doing damage, a man cannot take one of them as a distress for the whole damage; but he may distrain one of them for its own damage, and bring an action of trespass for the damage done by the rest. *Hoskins* v. *Robbins*, 2 Saund. 327; *Vaspor* v. *Edwards*, 12 Mod. 660. It seems that an animal doing damage to the freehold is doing such a damage as will justify the distraining of the animal damage feasant, providing the animal is then actually doing the damage, or, having done some damage, it is necessary to detain the animal in order to prevent its doing further damage. But if the owner of the freehold seizes an animal which has done damage to the freehold, but which has ceased doing so, and it is not necessary to detain the animal to prevent further damage, and the owner of the freehold detains the animal and feeds it for several days, and then sells it for its value, the owner of the animal is entitled to recover its full value, without any deduction for the feeding, as the owner of the freehold seized the animal in his own wrong. *Wormer* v. *Biggs*, 2 Car. & Kir. 31.

The right of distress damage feasant existed at common law and is not a creature of the statute, though legislation has been adopted to

regulate its exercise; so that it is inaccurate to speak of this remedy as something merely statutory and in derogation of the common-law rights of property. *Hamlin* v. *Mack*, 33 Mich. 103. The right to distrain beasts damage feasant, in New York, does not depend on the particular kind of injury done, or the place where it is committed. *Hale* v. *Clark*, 19 Wend. 498. The taking of another's beast when trespassing on the taker's land, and confining it in his barn, is sufficient to constitute a lawful distress damage feasant. *Hamlin* v. *Mack*, 33 Mich. 103.

§ 2. **When available as a defense.** No action lies against one who distrains cattle damage feasant for impounding them, instead of accepting a compensation for the damages, tendered before the cattle were impounded. *Anscomb* v. *Shore*, 1 Taunt. 261; S. C., 1 Camp. 285. Nor can an action be maintained for detaining cattle distrained damage feasant, where a tender of sufficient amends was made after the cattle had been impounded. *Sheriff* v. *James*, 1 Bing. 341; S. C., 8 Moore, 334. If a sufficient tender is made before the distress the remedy is replevin or trespass; if after the distress (and before the impounding), detinue. *Gulliver* v. *Cosens*, 1 C. B. 788; S. C., 9 Jur. 666; 14 L. J. C. P. 215.

A horse in the street damaging a barn-yard fence, while fighting a horse that was inside, may be lawfully distrained by the owner of the yard as doing damage within its inclosure. *Pettit* v. *May*, 34 Wis. 666.

If where damage feasant is claimed as a defense to an action of replevin, the fact is found that the animal was trespassing and doing damage, the defense is complete although there was no proof of any specific damage done by the beast. *Pierce* v. *Hosmer*, 66 Barb. 345.

§ 3. **When not available as a defense.** Where the action of trespass cannot be maintained, cattle damage feasant cannot be distrained, as there is no injury requiring amends. So held in Illinois, where cattle may lawfully run at large, and the owner of land cannot recover for trespass committed by them upon his land and unless the same is inclosed by a lawful fence. *Oil* v. *Rowley*, 69 Ill. 469. And the rule that the owner of property injured by cattle damage feasant is bound to the exercise of ordinary care to prevent the damage was applied, where the fence gaps through which they entered might have been closed in a short time, but there was no material on the ground for repairing them. *Little* v. *McGuire*, 38 Iowa, 560.

Cattle or goods in the actual use of a party cannot be distrained damage feasant. *Field* v. *Adams*, 4 P. & D. 504; S. C., 12 A. & E. 649; 1 Arn. & H. 17; 4 Jur. 113. So, a horse cannot be distrained damage feasant if there is a rider upon him. *Storey* v. *Robinson*, 6

T. R. 138. But a horse may be distrained damage feasant although he is led by a person at the time. *Wagstaff* v. *Clack*, Cambridge Sum. Assizes, M. S. And where an action was commenced for taking the plaintiff's dog; and the defense was that he was distrained damage feasant, a replication that the dog when taken was in the actual possession of the plaintiff's servant and under the personal care of, and being used by him, was held to be insufficient, as applied to a dog, to show such user of it as exempted it from seizure. *Bunch* v. *Kennington*, 1 Q. B. 679; S. C., 4 P. & D. 509; 5 Jur. 461.

A person into whose field cattle have strayed through defect of fences which he was bound to repair, cannot distrain them damage feasant in another field, into which they have got by breaking through a hedge which he kept in good repair, since his neglect was the original cause of the mischief. *Singleton* v. *Williamson*, 7 Hurl. & Nor. 410; S. C., 8 Jur. (N. S.) 60; 10 W. R. 174; 5 L. T. (N. S.) 664; 31 L. J. Exch. 17.

§ 4. **Who may interpose it.** Where one enters peaceably, and without writ, upon, and takes possession of land purchased by him under a sale upon a decree in chancery, he is in possession, so that he may distrain cattle damage feasant. *Orser* v. *Storms*, 9 Cow. 687. And where A demised to B the milk of twenty-two cows to be provided by A, and to be fed at A's expense on certain closes belonging to A, who covenanted that no other cattle should be fed there, it was held that B might distrain other cattle of A doing damage there. *Burt* v. *Moore*, 5 T. R. 329. So, where A, being possessed of a quantity of land in a common field and having a right of common over the whole field, and B also having a right of common over the whole field, they enter into an agreement for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenants to that effect, if during the term the cattle of B come upon the land of A, he may distrain them damage feasant. *Whiteman* v. *King*, 2 H. Bl. 4. But if two persons have the concurrent possession of land for the purpose that each may take profits of a special nature, and distinct from, but not inconsistent with, the right of the other, one cannot distrain the cattle of the other damage feasant. *Churchill* v. *Evans*, 1 Taunt. 529.

A tenant holding over after the expiration of his term cannot distrain the landlord's cattle which were put upon the premises by way of taking possession. *Taunton* v. *Costar*, 7 T. R. 431.

§ 5. **How interposed.** A distress for damage feasant must be pleaded specially. It is not sufficient in replevin to plead merely, that the defendant was *possessed* of a close, and because the cattle trespassed,

etc., he took them damage feasant. But it may be alleged generally that the close was the close, soil and freehold of the defendant. 1 Chit. Plead. (7th Am. ed.) 538. But in New Hampshire, the defendant avowed the taking of the cattle as damage feasant in his inclosure, without any further specification of title, and that was held sufficient under the *statute*. *M'Intyre* v. *Marden*, 9 N. H. 288. When the defendant justifies the taking he must show a full and entire compliance with the requisitions of the statute, or he becomes a trespasser *ab initio*. *Morse* v. *Reed*, 28 Me. 481; *Hale* v. *Clark*, 19 Wend. 498; *Simser* v. *Cowan*, 50 Barb. 395.

In an action for impounding cattle, and keeping them so close that one died, to which there was a justification for damage feasant, without stating the dying of the beast, the plea was held good, as the death was only *gravamen*, and need not be answered. *Gates* v. *Bayley*, 2 Wils. 313.

# CHAPTER XVIII.

## DEFENSE OF SELF, OF FAMILY, ETC.

### ARTICLE I.

#### GENERAL RULES AND PRINCIPLES.

**Section 1. Definition and nature.** In criminal law the protection of one's person and property from injury is self-defense. And the law of self-defense is the same in civil as in criminal prosecutions, with the exception of the rule of evidence which, in a criminal cause, gives the defendant the benefit of a reasonable doubt. *March* v. *Walker*, 48 Tex. 372.

A man may repel force by force in defense of his person, property or habitation against any one who manifests, intends, attempts or endeavors by violence or surprise, to commit a forcible felony, such as murder, rape, robbery, arson, burglary and the like. In these cases he is not required to retreat, but he may resist and even pursue his adversary, until he has secured himself from all danger. *Gray* v. *Combs*, 7 J. J. Marsh. (Ky.) 478. And see *Bird* v. *Holbrook*, 4 Bing. 628. But the right of self-defense is *simply* the right to *repel* by force, force unlawfully exerted. The repellant force, thus permitted to be used, must be protective and not merely aggressive. When protection is achieved, the legitimate end of the force allowed to be resorted to is accomplished. It should then cease. Upon this principle, it is allowed to take life in order to protect life, or to protect the person assailed from serious bodily harm. But the danger to the life or limb of the slayer must be apparent and pressing and it must be of such degree and character as threatened a fatal result in order to justify a homicide. A mere pursuit "with hostile intent" is not enough. *Lewis* v. *State*, 51 Ala. 1. See *Baldwin* v. *Hayden*, 6 Conn. 453; *Gallagher* v. *State*, 3 Minn. 270; *Taylor* v. *Clendening*, 4 Kans. 524; Vol. 1, p. 338. But at common law the right of self-defense is not limited to actual peril of the life of the party assailed. When a person apprehends that some one is about to do him great bodily harm, and there is reasonable ground for believing the danger that such design will be accomplished imminent, he may safely act upon appearances and even kill the assail-

ant, if that be necessary to avoid the apprehended violence. *State* v. *Sloan*, 47 Mo. 604; *State* v. *Fraunburg*, 40 Iowa, 555; *State* v. *Collins*, 32 id. 36. The degree of force which may be employed in repelling the assault depends to some extent upon the known character of the assailant, whether peaceable or quarrelsome. *Harrison* v. *Harrison*, 43 Vt. 417. A person who seeks a fight, and provokes another to strike him, cannot justify a blow on the ground of self-defense. *State* v. *Bryson*, 1 Winst. (N. C.) No. 2, 86; *Watrous* v. *Steel*, 4 Vt. 629.

Apparent danger is a legal term, with a fixed and definite meaning. What circumstances constitute apparent danger is primarily a mixed question of law and fact; but, when all the facts are ascertained, it is a question of law alone. *Long* v. *State*, 52 Miss. 23. The stage of the difficulty at which self-defense ceases is just the same, whether the question be prosecuted civilly or criminally. *March* v. *Walker*, 48 Tex. 272.

§ 2. **Right to defend one's self.** See Vol. 1, pp. 337–340. To sustain a plea of self-defense, it must not only appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the slayer really acted under the influence of those fears, and not in a spirit of revenge, but it must also appear that he thought and believed, and had good reason to think and believe, that the danger was so urgent and pressing, *at the time of the killing*, that in order to save his own life, or prevent a felony on his person, the killing of the other was absolutely necessary; and it must appear, also, either that the person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given. *Stiles* v. *State*, 57 Ga. 183. See *State* v. *Potter*, 13 Kans. 414; *Holloway* v. *Commonwealth*, 11 Bush (Ky.), 344; *White* v. *Maxey*, 64 Mo. 552; *Gilleland* v. *State*, 44 Tex. 356.

One attacked with felonious intent may resist, to the extent of taking the assailant's life. He is not under obligation to retreat. But one attacked without felonious intent must retreat, if he can, before he can justify killing his adversary. *State* v. *Dixon*, 75 N. C. 275; *Erwin* v. *State*, 29 Ohio St. 186; 23 Am. Rep. 733. And see *McPherson* v. *State*, 29 Ark. 225.

In an action for an assault it is competent to the defendant to give evidence of an assault by the plaintiff, without a plea of *son assault demesne*. *Syers* v. *Chapman*, 2 C. B. (N. S.) 438.

§ 3. **Right to defend family.** The right to repel an assault by force extends to the mutual and reciprocal defense of each other by husband and wife, parent and child, master and servant. 2 Broom & Had. Comm. (Wait's Notes) 2. And see *ante*, Vol. 1, p. 338;

*Hathaway* v. *Rice*, 19 Vt. 102. But a son can justify an assault and battery in defense of his father, only where the latter was first assailed, and was resisting the attack when the former interfered; and only to the extent of such force as may be necessary for the father's defense. *Obier* v. *Veal*, 1 Houst. (Del.) 449. A son would not be justified in interposing, on his father's side, in a fight, in which his father and another are engaged by mutual consent and on equal terms, and knocking the antagonist down. *State* v. *Johnson*, 75 N. C. 174; *Waddell* v. *State*, 1 Tex. App. 720. And to justify an assault by a man in defense of his son or his property, the danger should be such as to induce one exercising a reasonable and proper judgment to interfere to prevent the consummation of the injury. *Hill* v. *Rogers*, 2 Clarke (Iowa), 67.

§ 4. **Right to defend others.** A person may lawfully interfere in behalf of a stranger, and employ a reasonable amount of force to protect him from unlawful violence, thus avoiding a breach of the peace. *Mellen* v. *Thompson*, 32 Vt. 407. But the fact that a man and woman live together in a relation of concubinage does not, of itself, justify the man in taking life in defense of the person of the woman, and it is not error, upon evidence of such fact, to instruct the jury that the law of justification does not apply. *Parker* v. *State*, 31 Tex. 132.

§ 5. **Right to defend land.** See Vol. 1, p. 339. An assault by a man in defense of his property is justifiable. *Alderson* v. *Waistell*, 1 C. & K. 358; *Parsons* v. *Brown*, 15 Barb. 590. And so is the assault of the son, or tenant of the owner acting under the latter's authority. *Tribble* v. *Frame*, 7 J. J. Marsh. (Ky.) 599, 617; *Corey* v. *The People*, 45 Barb. 262. And mechanics who are in charge of a house which they are engaged in building have a right to gently remove persons coming into the building without authority. *United States* v. *Bartle*, 1 Cranch (C. C.), 236. But a tenant in common has no right to inflict a battery upon one who enters upon the land under the authority of the co-tenant; and, in this respect, there is no distinction between the co-tenant and one entering with him, and under his authority. *Causee* v. *Anders*, 4 Dev. & B. L. (N. C.) 246; *Commonwealth* v. *Lakeman*, 4 Cush. 597. A person on whose land another has committed a trespass, merely by coming upon it, and is going away, has no right to seize and detain him in order to compel him to give his address. *Ball* v. *Axten*, 4 F. & F. 1019.

If a person enters a house with force and violence, the person whose house is entered may justify turning him out by force, without making a previous request to him to depart. *Tullay* v. *Reed*, 1 Carr. & P. 6. But if he enters quietly he must be requested to leave, and upon refusing to do so, the owner may then use as much force as is necessary to

put him out. Id.; *State* v. *Woodward*, 50 N. H. 527. So, one who enters an office for the transaction of business may be ejected by the owner or agent, after a request to leave and a refusal, no more force being used than is necessary. *Esty* v. *Wilmot* 15 Gray, 168; *Pierce* v. *Hicks*, 34 Ga. 259; *Timothy* v. *Simpson*, 6 Carr. & P. 500; Vol. 1, p. 340. If a person comes into a house, or is in it, and makes a noise and disturbs the peace of the family, although no assault has been committed, the master of the house may turn him out, or call a policeman to do so. *Shaw* v. *Chairitie*, 3 Car. & Kir. 21.

The owner of land has a right to use sufficient force to prevent the entry of another for the purpose of obtaining a chattel belonging to him, and being upon the land without right. *Newkirk* v. *Sabler*, 9 Barb. 652. See *Kenny* v. *Planer*, 3 Daly (N. Y.), 131. Although a man may justify the use of so much force as is necessary to defend the possession of his house, lands, or goods, or his person from threatened violence, it does not follow that he may lead a riot to dispossess those who are unlawfully in possession thereof, under a claim of right. *State* v. *Yeaton*, 53 Me. 125.

§ 6. **Right to defend personal property.** An assault and battery may be justified in defense of real or personal property; but unless the assailant uses force in fact, not before a request to depart; and then the plea should in general be *molliter manus imposuit*. *M'Ilvoy* v. *Cockran*, 2 A. K. Marsh. 271; *Robinson* v. *Hawkins*, 4 Monr. (Ky.) 134; *Baldwin* v. *Hayden*, 6 Conn. 453. And an owner of goods (or his servants acting by his command) which are wrongfully in the possession of another, may justify an assault, in order to repossess himself of them, no unnecessary violence being used. *Blades* v. *Higgs*, 10 C. B. (N. S.) 713; S. C., 7 Jur. (N. S.) 1289; 30 L. J. C. P. 347; 4 L. T. (N. S.) 551; 2 Broom & Had. Comm. (Wait's Notes) 4, note 429; Vol. 1, p. 341. But he would not be justified in using force or violence amounting to a breach of the peace. *Barnes* v. *Martin*, 15 Wis. 240; *Andre* v. *Johnson*, 6 Blackf. (Ind.) 375; *State* v. *Elliott*, 11 N. H. 540.

§ 7. **Mode and extent of defense.** In an action for a personal assault, if the defendant justifies under the plea of *son assault demesne*, he must show that the plaintiff committed the first assault, and that what was done by himself was in the necessary defense of his own person. *Rogers* v. *Waite*, 44 Me. 275. And he must also show that the force used by him was appropriate in kind, and commensurate in degree. Id.; *Reece* v. *Taylor*, 4 N. & M. 470; S. C., 1 H. & W. 15. If the party first assaulted uses excessive force beyond what is necessary for self-defense, he is liable for the excess, and the facts may be shown under the replication of *de injuria*. *Dole* v. *Erskine*, 35 N. H. 503; *Philbrick* v.

*Foster*, 4 Ind. 442; *Gaither* v. *Blowers*, 11 Md. 536; *Dean* v. *Taylor*, 11 Exch. 68. But see *contra*, *Rimmer* v. *Rimmer*, 16 L. T. (N. S.) 238.

Where a house is assailed with intent to take life or inflict great bodily harm, the occupant may lawfully use such fatal means to protect himself and family as would be necessary if met by his assailant face to face in any other place. In either case, the point of justification is the necessity of such means in order to the rightful, effectual protection. *State* v. *Patterson*, 45 Vt. 308; 12 Am. Rep. 200.

Upon a trial for homicide, where the prisoner claims that the killing was done in self-defense, he is required to satisfy the jury by a preponderance of evidence. He must produce the same degree of proof that would be required if the blow inflicted had not produced death, and he had been sued for assault and battery, and had set up a justification. It is not sufficient for him to raise a reasonable doubt, neither is it necessary for him to establish his justification beyond a reasonable doubt. *People* v. *Scrhyver*, 42 N. Y. (3 Hand) 1; S. C., 1 Am. Rep. 480. And see *March* v. *Walker*, 48 Tex. 372.

Where, in an affray between the plaintiff and the defendant, it was known to both that two hired men of the defendant were near by, it was held that the jury might consider that fact, as bearing upon the question of how much force the defendant had a right to use, under the circumstances, in self-defense in repelling the assault. *Edwards* v. *Leavitt*, 46 Vt. 126.

§ 8. **What not a lawful defense** Although a man assaulted in his own house need not retreat, but may use any degree of force or violence necessary for his protection, yet, even here, mere words, however violent, unaccompanied by overt acts, will not furnish a justifiable cause for an attack. *State* v. *Martin*, 30 Wis. 216; 11 Am. Rep. 567; *Cushman* v. *Ryan*, 1 Story, 91. And if A comes up to attack B, and B puts himself in a fighting attitude to defend himself, this is not an assault by B, and will not, in an action by B against A for an assault, support a plea by A of *son assault demesne*. *Moriarty* v. *Brooks*, 6 Carr. & Payne, 684. The party seeking and bringing on a quarrel cannot avail himself of the plea of homicide in self-defense. *State* v. *Linney*, 52 Mo. 40.

No past threats or conduct of the deceased will excuse a homicide, without sufficient present demonstration to authorize the belief that the deadly purpose then exists, and the fear that it will then be executed. *Williams* v. *State*, 3 Heisk. (Tenn.) 376.

§ 9. **How interposed.** To an action for an assault and battery, the defendant may plead that the plaintiff, with force and arms, and with

a strong hand, endeavored forcibly to break and enter the defendant's close; whereupon the defendant resisted and opposed such entrance, and if any damage happened to the plaintiff it was in the defense of the possession of the close. *Weaver* v. *Bush*, 8 T. R. 78. *Molliter manus imposuit* is an answer to the battery. *Titley* v. *Foxall*, 2 Ld. Raym. 308.

In an answer to a complaint for an assault and battery, *son assault demesne* may be interposed. 3 Bla. Comm. 120. And see Vol. 1, p. 337. But the plea of *son assault* admits the assault. *Hay* v. *Kitchen*, 1 Wils. 171. And the defendant will not be permitted to first deny the assault and then to set up *son assault demesne*. *Schneider* v. *Schultz*, 4 Sandf. 664. But it has been held that it is competent for the defendant to give evidence of an assault by the plaintiff, without a plea of *son assault demesne*. *Syers* v. *Chapman*, 2 C. B. (N. S.) 438.

# CHAPTER XIX.

## DURESS.

### ARTICLE I.

#### OF DURESS IN GENERAL.

**Section 1. Definition and nature.** Duress is an unlawful constraint exercised upon a person, in consequence of which he does some act which he would not otherwise do, or refrains from doing some act which he desires to do. This constraint must proceed from actual violence or from well-grounded fear of personal injury. The first is called duress *per vim*, and the second duress *per minas*. The first is the illegal restraint of personal liberty, whether in prison or elsewhere, or illegal force or privation imposed upon a person legally imprisoned, for the purpose of extorting some promise or contract from the person so imprisoned. *Watkins* v. *Baird*, 6 Mass. 506; *Richardson* v. *Duncan*, 3 N. H. 508; *Williams* v. *Brown*, 3 B. & P. 69; *Strong* v. *Grannis*, 26 Barb. 122. Duress *per minas* is either, 1, for fear of loss of life; 2, of loss of members; 3, of mayhem; 4, of imprisonment. *Baker* v. *Morton*, 12 Wall. (U. S.) 150. This fear must be upon sufficient reason, such as would move a man of reasonable courage. *Bosley* v. *Shanner*, 26 Ark. 280. Whether threats of a mere battery will amount to duress is a disputed question, but the preponderance of authority is that it will not. *King* v. *Southerton*, 6 East, 127, 140; *Sumner* v. *Ferryman*, 11 Mod. 201; *Astley* v. *Reynolds*, 2 Strange, 915; *Edwards* v. *Handley*, Hardin (Ky.), 611; *Maisonnaire* v. *Keating*, 2 Gall. (S. C.) 337; *Hazelrigg* v. *Donaldson*, 2 Metc. (Ky.) 447. Whether threats of injury to or restraint of property will amount to duress, we shall consider *post*, p. 658, § 6. It is laid down that where the threat is of an injury for which full and entire adequate compensation may be expected from the law, such duress will not of itself avoid a contract, for the threatened person ought to have sufficient resolution to resist the threat and rely upon the law. *Atlee* v. *Backhouse*, 3 M. & W. 642. Whereas, for serious and actual personal violence no damages can be an adequate compensation, and therefore a man of ordinary firmness may be unable to withstand the threat and immediate danger of such personal mischief,

and no man shall be held bound to incur such danger. But probably now more attention would be given to the actual effect of the threats upon the person in question overpowering his will. In *Taylor* v. *Jaques*, 106 Mass. 291, the judge in his charge defined duress as coercion, by an unlawful restraint of the liberty of the person who is the subject of the duress, by imprisonment without legal process, or by legal process sued out maliciously or without probable cause, or by threats of imprisonment, inducing a reasonably grounded fear of restraint of liberty, and that the coercion by one of these modes must have been the inducing and controlling cause of his contract, by overcoming his mind and will, and this was approved by the full court. The constraint which takes away free agency and destroys the power of withholding assent to a contract, and thus constitutes duress, must be the result of a danger which is imminent and without immediate means of prevention. *Miller* v. *Miller*, 68 Penn. St. 486. The conclusion of coercion is not always a necessary one from the fact of unlawful restraint, and it must appear that the action of the party has been influenced by it. *Feller* v. *Green*, 26 Mich. 70. In *Radich* v. *Hutchins*, 95 U. S. 210, it is said: The duress or coercion which will render a payment involuntary must consist of some actual or threatened exercise of a power possessed, or believed to be possessed by the party exacting or receiving payment, over the person or property of another from which the latter has no other means of immediate relief than by making payment. *Baltimore* v. *Leffeman*, 4 Gill (Md.), 425; *Brumagim* v. *Tillinghast*, 18 Cal. 265; *Mays* v. *Cincinnati*, 1 Ohio St. 268. It is equally duress, although no express threats are made, but advantage is taken of circumstances which bring the party into peril. Such are cases of military orders in time of war (*Olivari* v. *Menger*, 39 Tex. 76); or the receipt of Confederate currency under the fear of violence, in the excited state of the public mind. *Jones* v. *Rogers*, 36 Ga. 157. But the pressure of public opinion, unaccompanied by peril to life, limb or liberty, will not excuse the conversion by a guardian of his ward's property into a depreciated currency or securities. *Humphrey* v. *Humphrey*, 79 N. C. 396. In some cases the fact that the claim enforced was just has been considered as an answer to the charge of duress. *Diller* v. *Johnson*, 37 Tex. 47; *State* v. *Davis*, 79 N. C. 603; *Knapp* v. *Hyde*, 60 Barb. 80. But the contrary doctrine is better supported. *Osborn* v. *Robbins*, 36 N. Y. 371; *Taylor* v. *Jaques*, 106 Mass. 291; *Phelps* v. *Zuschlag*, 34 Tex. 371.

§ 2. **What amounts to duress.** Duress by imprisonment may be, first, by a restraint exercised upon the person without pretense of right. *Clark* v. *Pease*, 41 N. H. 418. The only question which can arise in such case is whether the imprisonment caused the act whose effect the

party imprisoned is seeking to avoid. *Bosley* v. *Shanner*, 26 Ark. 280; *Feller* v. *Green*, 26 Mich. 70. As we have seen, if the party's own cowardice or weakness, witthout good reason, caused the act, he cannot complain. *Atlee* v. *Backhouse*, 3 M. & W. 642; *Miller* v. *Miller*, 68 Penn. St. 486; *Sumner* v. *Ferryman*, 11 Mod. 201. The question arises in a more difficult form where the arrest is on legal process, civil or criminal, and the party makes some contract to secure his freedom. If such process is absolutely void, as if the court from which it issues has no jurisdiction of the cause or no authority to issue such process, the arrest or imprisonment is of course unlawful, and is the mere act of the parties, and does not differ from the case where they have no process or warrant whatever, and any obligation given by the prisoner as a bail bond or recognizance for his enlargement is voidable for duress. *Stepney* v. *Lloyd*, Cro. Eliz. 647. Thus, where an affidavit is required to hold the person arrested to bail and the affidavit is insufficient, the bail bond may be avoided. *Norton* v. *Danvers*, 7 T. R. 375. So, where in bastardy process the warrant was returned before another justice than the one who issued it, and he ordered the respondent into custody till he gave bond. *Fisher* v. *Shattuck*, 17 Pick. 252. So, where in bastardy process a justice issued a warrant to a constable in another county, and, being arrested, the defendant promised to marry the complainant, such promise is void. *Tilley* v. *Damon*, 11 Cush. (Mass.) 247; *Cavanagh* v. *Saunders*, 8 Me. 426; *Ferry* v. *Burchard*, 21 Conn. 598; *Foy* v. *Talburt*, 5 Cranch (C. C.), 124. It was formerly held that imprisonment under regular and formal legal process, though malicious and without probable cause, did not constitute duress. *Anonymous*, 1 Lev. 68. But in *Watkins* v. *Baird*, 6 Mass. 506, 511, it is said that it is a correct and sound principle of law, when a man shall falsely, maliciously and without probable cause, sue out a process in form regular and legal to arrest and imprison another, and shall obtain a deed from the party thus arrested to procure his deliverance, such deed may be avoided for duress of imprisonment, for such imprisonment is tortious and unlawful as to the party procuring it, and he is answerable in damages for the tort in an action for a false and malicious prosecution, the suing of legal process being an abuse of law and a proceeding to cover the fraud. An arrest for improper purposes without just cause, or for just cause, but without legal authority, or for just cause with legal authority but for unlawful purposes, may be construed a duress. *Strong* v. *Grannis*, 26 Barb. 122; *Severance* v. *Kimball*, 8 N. H. 386; *Osborn* v. *Robbins*, 33 N. Y. 371; *Bush* v. *Brown*, 49 Ind. 578; *Brownell* v. *Talcott*, 47 Vt. 243. But in *Knapp* v. *Hyde*, 60 Barb. 80, where the defense was duress by threat of

imprisonment, it was held that the imprisonment threatened must be unlawful. *Davis* v. *Luster*, 64 Mo. 43; *Diller* v. *Johnson*, 37 Texas, 47. Where the arrest was originally valid and legal, duress may arise from some subsequent abuse of the process, as where the imprisonment is accompanied by such circumstances of unnecessary pain, privation or danger that by them the party is induced to enter into the contract. *Watkins* v. *Baird*, 6 Mass. 506, 511. The abuse of any process, either civil or criminal, to compel a party by imprisonment to do any act against his will, except to pay the debt for which he is arrested, if the proceeding is civil, is entirely illegal, and the act may be avoided on the ground of duress. *Clark* v. *Pease*, 41 N. H. 418; *Seiber* v. *Price*, 26 Mich. 518. Thus, for example, the payment of other sums than the execution called for (*Breck* v. *Blanchard*, 22 N. H. 303), or where a warrant for extradition for obtaining goods under false pretenses is used to compel a settlement for such goods, or to obtain a note in payment for them. *Shaw* v. *Spooner*, 9 N. H. 197.

It is enough if one of the objects of an arrest made by a proper officer under a legal warrant was to extort money, or enforce the settlement of a civil claim, and the discharge of a person arrested without being taken before a magistrate, and the failure to return the warrant, are competent evidence on this point. *Hackett* v. *King*, 6 Allen, 58.

Such abuse of legal process will make the persons concerned trespassers *ab initio* and establish the defense of duress. *Stauffer* v. *Latshaw*, 2 Watts (Penn.), 167; *Seiber* v. *Price*, 26 Mich. 518. Where the claim is of duress by threats, it must appear that they reasonably caused fear of some grievous wrong, as of death or great bodily injury or unlawful imprisonment. The threat need not be made at the very time nor to the person himself, if it is communicated to him and it appears that it controlled his action. Thus, a threat of prosecution for embezzlement made to a friend several days before may be a defense to a note for the amount claimed to have been embezzled given several days afterward. *Taylor* v. *Jaques*, 106 Mass. 291. Husband and wife are regarded in law for most purposes as one person. An obligation, therefore, made by the husband to relieve the wife from duress, or by the wife to relieve the husband, may be avoided, as if the duress had been directly to the contracting party. *Eadie* v. *Slimmon*, 26 N. Y. 9; *Green* v. *Scranage*, 19 Iowa, 461; *Brooks* v. *Berryhill*, 20 Ind. 97. Where the debtor was a member of a vigilance committee appointed at a large meeting, who publicly announced that they would hold all persons as enemies of the Confederacy who refused to receive its currency in payment of debts, and would use their best endeavors to bring them to condign punishment with or without law, and he reported the

creditor for refusing payment in Confederate currency, and he was thereupon summoned before the committee and denounced as a traitor, it was held to be duress. *Jones* v. *Rogers*, 36 Ga. 157; *Boyle* v. *Hammons*, 2 Heisk. (Tenn.) 136. A principal may avoid a deed made by his agent while under duress (*Cumming* v. *Ince*, 11 Q. B. 112), or by his bailee. *Koehler* v. *Wilson*, 40 Iowa, 183.

§ 3. **What does not amount to duress.** As a general rule imprisonment by order of law is not duress that will avoid a contract, and therefore if a man, supposing that he has a cause of action against another, cause him to be arrested and imprisoned by lawful process, and the defendant voluntarily execute a deed or note, or make any other promise to obtain his deliverance, he cannot avoid such contract by duress of imprisoment, although the plaintiff had no cause of action. *Watkins* v. *Baird*, 6 Mass. 506, 511. *A fortiori* if a man under arrest, or imprisoned for a just cause, make an agreement voluntarily for the purpose of procuring his liberty, he cannot avoid it on the ground of duress. *Shepherd* v. *Watrous*, 3 Cai. (N. Y.) 166; *Crowell* v. *Gleason*, 10 Me. 325; *Meek* v. *Atkinson*, 1 Bailey (S. C.), 84; *Waterman* v. *Barratt*, 4 Harr. (Del.) 311; *Smith* v. *Atwood*, 14 Ga. 402; *Nealley* v. *Greenough*, 25 N. H. 332. Where the defense is duress by threats, the party must prove that he was threatened with, and reasonably feared, some unlawful violence. Those contracts only which are made under fear of unlawful imprisonment, and not those made under fear of imprisonment which would be legally justifiable, can be avoided for duress. Thus where the defendant was induced by the threat of a lawful imprisonment, upon a warrant for assault, to submit to arbitration, the amount to be paid in satisfaction of the injury, and to give a note for the amount so ascertained, the note is valid. *Eldy* v. *Herrin*, 17 Me. 338. So a threat by a judgment creditor to levy his execution is not such duress as to make void an agreement to pay the sum due. *Wilcox* v. *Howland*, 23 Pick. 167; *Waller* v. *Cralle*, 8 B. Monr. (Ky.) 11. If an individual having a legal demand against another should call on him for payment and, in the course of urging him to comply with his obligation, should tell him that if he did not pay the debt he would send him to prison, and the debtor should thereupon make payment, the money could not be recovered back on account of this menace. *Alexander* v. *Pierce*, 10 N. H. 497. Mere threats of criminal prosecution do not constitute duress, without threats of immediate imprisonment. *Lester* v. *Union Man. Co.*, 1 Hun (N. Y.), 288; S. C., 6 N. Y. S. C. (T. & C.) 657; *Plant* v. *Gunn*, 2 Woods (C. C.), 372. Threats of a criminal prosecution for embezzlement, and a civil action for money charged to have been fraud-

ulently withheld, not importing a purpose to make any unusual, harsh, oppressive or illegal use of process, is not duress. *Landa* v. *Obert*, 45 Tex. 539. Where the officer read the warrant to the accused, and then left him without actually taking him into custody, and he afterward appears and confesses judgment, he cannot claim duress. *Baldwin* v. *Murphy*, 82 Ill. 485. Threats to resort to legal proceedings to collect a debt do not constitute duress. *Snyder* v. *Braden*, 58 Ind. 143. Pressure of public opinion, unaccompanied with peril to life or limb, will not excuse a breach of duty. *Humphrey* v. *Humphrey*, 78 N. C. 396. Taking Confederate currency on a check at Richmond cannot be excused by fear of being compelled to remain in the Confederacy. *Lester* v. *Union Man. Co.*, 1 Hun, 288; 3 N. Y. S. C. (T. & C.) 657. Where a person arrested on execution has applied to take the poor debtor's oath, an assignment of his property to the plaintiffs, on their agreeing not to oppose his discharge, is valid. *Grimes* v. *Briggs*, 110 Mass. 446.

Where a woman was confined in a lunatic asylum, and after her discharge her husband told her that unless she would consent to live away from him and accept an allowance, she should be sent to another asylum, there was no duress. *Biffin* v. *Bignell*, 7 Hurl. & N. 877. The weight of authority is that violence or threats of violence to another person, unless a husband or wife, will not be duress. *Martin* v. *Broadus*, 1 Freem. (Miss.) 35; *Steinbaker* v. *Wilson*, 1 Leg. Gaz. R. (Penn.) 76. Thus a bond given by a mother to procure the release of her son is good. *Simms* v. *Barefoot*, 2 Hayw. (N. C.) 402. But in 2 Brownl. 276, it is said that a father may avoid his deed given by the duress of imprisonment of his son but not of his servant, and that the mayor and commonalty of a city may avoid a deed sealed by duress of imprisonment of the mayor. In *Fulton* v. *Hood*, 34 Penn. St. 365, it was held that threats of a criminal prosecution against the son, unless the father would give a bond, were no defense to the bond. Where the plaintiff's husband was charged with embezzlement, and she at his request, and on the agreement that there should be no prosecution, conveyed her real estate to the creditor, she cannot avoid the deed for duress. *Smith* v. *Rowley*, 66 Barb. 502. Where the threat was of an arrest, for that which was not a crime, it was held no duress. *Knapp* v. *Hyde*, 60 id. 80. In *Davis* v. *Luster*, 64 Mo. 43, it was decided that threats of a lawful prosecution were not duress. Duress cannot be predicated of compulsion to discharge a legal duty. *State* v. *Davis*, 79 N. C. 603. As to when a person can have relief from his acts on contracts done or made under duress of his goods (§ 6, *post*, p. 658), where the duress was by a mob, and the party who received the contract knew

the circumstances, but had no part in them, he can enforce the contract, as where the owner of land is ordered by a mob to leave the region, and he, under the threat, contracts to sell his land. *Talley* v. *Robinson*, 22 Gratt. (Va.) 888. So where a husband forced his wife to sign a mortgage, but the mortgagee was ignorant of the wrong, he can enforce it. *Green* v. *Scranage*, 19 Iowa, 461.

§ 4. **Duress by imprisonment.** The confinement of the person in anywise is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. 2 Broom & Had. Com. 495, note 706, Wait's ed. To make the imprisonment lawful it must be either by process from the courts of judicature or by warrant from some legal officer having authority to commit to prison, which warrant must be in writing under the hand and seal of the magistrate, and express the causes of commitment. Id. 137. Lord Coke says: (12 Inst. 483) "It is observable how fear of imprisonment is more grievous and odious in the law than the fear of battery."

As we have seen, *ante*, pp. 650, 651, 652, § 2, even where the arrest or restraint is legal in its inception, it may be a ground for the defense of duress by reason of some subsequent abuse, as where criminal process is used to enforce the payment of a debt, or illegal force or privation is imposed upon the prisoner while legally restrained. *Williams* v. *Brown*, 3 B. & P. 69; *Pole* v. *Harrobin*, 9 East, 417, *n*. It is not necessary that the person should know that his imprisonment is unlawful. A person who is arrested as he supposes legally, and gives bail or a bond to secure his liberty, may escape performance if he afterward can discover any error which made the arrest unlawful. *Stearns* v. *Veasey*, 33 N. H. 64. Whether the debtor, knowing the execution to be void, could give a bond instead of asking to have the execution set aside, may be doubtful, for in every case the jury must find that the duress was the cause of the contract. Id. An actual arrest perhaps would not be necessary, if there was the present power and intention to make it, and the bond was given in consequence. Id. Where a party was arrested on a charge of rape, and gave a note to the party complaining, he was allowed to prove that the charge was false, and that he gave the note in order to procure his release. *Osborn* v. *Robbins*, 36 N. Y. 365. Any unlawful imprisonment is duress. *Bowker* v. *Lowell*, 49 Me. 429. A note given by a person legally imprisoned in order to procure his discharge, if the plaintiff was only fairly in prosecution of his legal rights, is valid. *Bates* v. *Butler*, 46 Me. 387; *Smith* v. *Atwood*, 14 Ga. 402. Where on arrest on civil process the defendant gave a note in settlement, he cannot defend on the ground of duress, unless an im-

proper use was made of the process, either in willfully magnifying the amount due in order to prevent the defendant from getting bail, or by some attempt at extortion after the arrest. *Holmes* v. *Hill*, 19 Mo. 159. It is necessary to prove an unlawful imprisonment or an abuse of, and oppression under legal process. *Taylor* v. *Cottrell*, 16 Ill. 93; *Stebbins* v. *Niles*, 25 Miss. 267. Where the arrest was made by reading the warrant and the officer then left the accused without actually taking him into custody, if he afterward appears and confesses judgment in satisfaction of the claim, he cannot claim relief for duress. *Baldwin* v. *Murphy*, 82 Ill. 485.

§ 5. **Duress by threats.** The threats must be to do that which, if done, would be duress by force. Thus threats to do that which would be in itself legal would not be duress unless used to procure some improper advantage. *Davis* v. *Luster*, 64 Mo. 43; *State* v. *Davis*, 79 N. C. 603. Threats of resorting to legal proceedings to collect a debt are not duress. *Snyder* v. *Braden*, 58 Ind. 143. Threats of a criminal prosecution for embezzlement and of a civil action for money charged to have been fraudulently withheld, but not importing a purpose to make any unusual, harsh, oppressive or illegal use of process, are not duress. *Landa* v. *Obert*, 45 Tex. 539; *Davis* v. *Luster*, 64 Mo. 43. A threat to arrest on execution if the judgment debt is not paid will not be duress, but the same threat to arrest if another debt is not paid may be. *Wilcox* v. *Howland*, 23 Pick. 167; *Waller* v. *Cralle*, 8 B. Monr. (Ky.) 11; *Eddy* v. *Herrin*, 17 Me. 338. In the next place it must appear that the threats have influenced the action of the party complaining and actually caused him to execute the contract in question. *Feller* v. *Green*, 26 Mich. 70; *Green* v. *Scranage*, 19 Iowa, 461; *Alexander* v. *Pierce*, 10 N. H. 498.

The constraint which takes away free agency and destroys the power of withholding assent to a contract must be one which is imminent and without immediate means of prevention, and such as would operate on a person of reasonable firmness of purpose. *Miller* v. *Miller*, 68 Penn. St. 486. Thus threats of a lawsuit are not duress. *Evans* v. *Gale*, 18 N. H. 397; *Harris* v. *Tyson*, 24 Penn. St. 347; *Wells* v. *Barnett*, 7 Tex. 584; *Snyder* v. *Braden*, 58 Ind. 143. This depends upon the nature of the threats and the circumstances under which they were uttered. Their nature must be such as are recognized by law as the foundation of duress, and the circumstances must be such as to sustain their effect. If the threats were of some trifling injury, or if under the circumstances they were improbable of execution, as where they were the menaces of a child, they could not justly be held duress. *Tapley* v. *Tapley*, 10 Minn. 448. On the other hand, mild language may cause

just terror when taken in connection with the circumstances. Thus where a person in the Confederate States accepted Confederate currency in payment of a debt, on being told that he was obliged to take them under the laws of the Confederate government, he was allowed to avoid the payment. *Mann* v. *Lewis*, 3 W. Va. 215; *Bogle* v. *Hammons*, 2 Heisk. (Tenn.) 136. In *Jones* v. *Rogers*, 36 Ga. 157, it is said: Concentration by the agency of the press or by associations of public opinion to effectuate any laudable intent, as to support the government or to sustain legally its circulation against depression, cannot be considered as duress. A person acting under the influence of public opinion, thus produced, is entitled to no relief in any court, for acts done under the legitimate pressure. But when his debtor, being a member of a vigilance committee who announce that they hold all persons as enemies to the Confederacy who refuse to take its currency, and will endeavor to bring them to punishment with or without law, reports him for refusing the currency, and he is summoned before the committee and denounced as a traitor, he is under duress. It would not be enough that he took the currency from fear of being compelled to remain in the Confederacy. *Lester* v. *Union Manuf Co.*, 1 Hun (N. Y.), 288; *Humphrey* v. *Humphrey*, 79 N. C. 396. A person was allowed to excuse his acts committed against his inclination under the orders of a military commandant after proclamation of martial law, though no threats or demonstrations of violence are used at the time. *Olivari* v. *Menger*, 39 Tex. 76. And a person was allowed to excuse his acts by proving that he was a soldier and acted unwillingly under the order of his superior officer. *Weatherspoon* v. *Woodey*, 5 Cold. (Tenn.) 149. Where a seaman was induced to assent to his discharge upon payment of a nominal sum from just apprehension of future ill-treatment, he was allowed to recover what was justly due him. *Bates* v. *Seabury*, 1 Sprague (C. C.), 433. It must appear that the threats caused the contract, and this may be so though the threats were not made directly to the person contracting, nor at the time. *Taylor* v. *Jaques*, 106 Mass. 291; *Sartwell* v. *Horton*, 28 Vt. 370. In the latter case the party was forced into an arbitration and two days after paid the sum awarded. It may also be so although the threat was to arrest for libel, when arrest for libel was not allowed by statute, if the party was put in fear thereby. *Foss* v *Hildreth*, 10 Allen, 80; *Bane* v. *Detrick*, 52 Ill. 19. But on the other side, where a merchant accused his cashier of embezzlement and he acknowledged that he had omitted to enter certain sums, begged his employer not to expose him, and gave his note for the amount, but his employer did not agree not to prosecute, nor that the amount so secured was all that was taken, there was no duress. *Catlin* v. *Henton*, 9 Wis. 476.

§ 6. **Duress of goods.** In South Carolina the courts have decided that there may be cases in which a man's necessities are so urgent and pressing that duress of his goods may avoid his acts, and where the party is unable to make satisfaction, or where there is no speedy tribunal to enforce it, it is there said, as the reason of the law ceases, the law itself does not apply. *Susportas* v. *Jennings*, 1 Bay (S. C.), 470; *Collins* v. *Westbury*, 2 id. 211; *Nelson* v. *Suddarth*, 1 Hen. & M. (Va.) 350. In *Foshay* v. *Ferguson*, 5 Hill, 158, the court say that a contract procured by threats of battery, or of the destruction of goods, may be avoided on the ground of duress. On the question whether a threat of burning a house would be duress to avoid a bond given under the influence of such threat, Chitty says (Conts. 207): "It may perhaps be doubted whether at the present day the threat to commit so serious an injury would not be considered a sufficient duress, for the threatened act is not only a capital offense, but naturally involves and endangers personal safety. And in numerous cases where money has been paid under protest for the purpose of procuring the return of goods illegally seized, the courts have allowed it to be recovered back, as not paid voluntarily or without consideration. *Chandler* v. *Sanger*, 114 Mass. 364; 19 Am. Rep. 367; *Chase* v. *Dwinal*, 7 Me. 134; *Harmony* v. *Bingham*, 12 N. Y. (2 Kern.) 99; *Ewing* v. *Peck*, 26 Ala. 413; *Oates* v. *Hudson*, 6 Exch. 346; *Garton* v. *Bristol & Exeter Railroad*, 1 B. & S. 112. But the English courts deny that the restraint or threats of the destruction of goods can constitute duress properly so called. *Atlee* v. *Backhouse*, 3 M. & W. 642, 650; *Skeate* v. *Beale*, 11 A. & E. 983. The question seems really to turn upon the state of mind of the person who enters into the contract, and where the threat, whether of mischief to the person or the property, was of sufficient importance to destroy the free action of a man of ordinary firmness, the law should not enforce any contract which he might by such means be induced to make. The fear, which is the ground of duress, does not seem to be the balancing of probable gain from two courses, but the terror which interferes with the free action of the faculties. Thus threats to expel a tenant, if he does not pay a disputed sum, are no duress. *Emmons* v. *Scudder*, 115 Mass. 372. Nor is a note given to release property from an illegal levy, void. *Bingham* v. *Sessions*, 6 Sm. & M. (Miss.) 13. Nor can a sale be avoided because the purchaser had attached, or threatened to attach, the property purchased, to enforce the payment of a debt. *Waller* v. *Galle*, 8 B. Monr. (Ky.) 11. Threats to withhold the payment of a debt, or to refuse the performance of a contract, or to do an injury which may be at once redressed by legal process, is not duress. *Miller* v.

*Miller*, 68 Penn. St. 486. Nor can a person avoid a receipt in full which he has given in order to obtain money due him of which he stood in great need. *Miller* v. *Coates*, 4 Thomp. & C. (N. Y.) 429. A refusal to deliver goods till a disputed claim is paid is not duress of goods. *Hibbard* v. *Mills*, 46 Vt. 243. The withholding of a man's property illegally does not place him under fear or duress. *Hazelrigg* v. *Donaldson*, 2 Metc. (Ky.) 445. But where there was a wrongful and fraudulent attachment of perishable property, like oysters, it was held duress to avoid a release. *Spaids* v. *Barrett*, 57 Ill. 289; 11 Am. Rep. 10; *Thurman* v. *Burt*, 53 Ill. 129.

Where, upon an illegal and violent seizure of a slave, the owner, in order to retain his services for the crop, is obliged to give a note to the captor for money lent to the owner's brother, the jury may find that it was executed under a species of duress, against which he may have relief. *Crawford* v. *Cato*, 22 Ga. 594. Duress of property only applies to personal property and not to real estate. *Fleetwood* v. *New York*, 2 Sandf. (N. Y.) 475. The whole question of duress of goods is closely related to that of fraud, and many of the cases come more properly under that head.

§ 7. **When it avoids a contract.** A contract made under duress is not strictly void, but only voidable, that is, it is capable of ratification and may be affirmed by the party under duress. Shep. Touch. 62, 288. It therefore may be necessary in some cases that the party should move seasonably to disaffirm the contract or he may lose the right as against innocent parties who have acquired an interest in the matter. *Doolittle* v. *McCullough*, 7 Ohio St. 299. Thus a delay of twelve years, during which valuable improvements had been made upon the property, was held ground for refusing to inquire into duress in the making of a deed. *Murphy* v. *Paynter*, 1 Dill. (C. C.) 333. The defense must appear to be made in good faith and seasonably. If the party has recognized securities given as valid for two years, he can have no relief. *Lyon* v. *Waldo*, 36 Mich. 345. In case of promissory notes, the defense of duress is like other defenses of fraud and the like and cannot be interposed against an innocent holder, who had no notice of the fraud and gave value for the note before maturity. In such case, however, the duress, when proved, will throw upon the holder the burden of proving these facts. *Duncan* v. *Scott*, 1 Camp's N. P. 100; *Holme* v. *Karsper*, 5 Binn. (Penn.) 469; *Clark* v. *Pease*, 41 N. H. 414; *Woodhull* v. *Holmes*, 10 Johns. 231; *Powers* v. *Ball*, 27 Vt. 662. If the holder took the note with notice the defense is open. *Osborn* v. *Robbins*, 36 N. Y. (9 Tiff.) 365. If, also, the note was overdue when the holder took it, or even if being payable in installments,

one installment is unpaid, the maker can set up the defense of duress. *Vinton* v. *King*, 4 Allen, 562. As we have seen, there is a distinction between avoiding a contract, in which case, actual duress must be proved, and the right to recover back money which has been paid, against the party's will. In the latter case no actual compulsion is necessary. Thus it is not a voluntary payment where taxes are paid to a collector who has a warrant for an illegal tax, though he has not distrained (*Perry* v. *Dover*, 12 Pick. 206; *Adam* v. *Litchfield*, 10 Conn. 127); or dues to an officer who refuses to give a clearance to a vessel till illegal fees are paid (*Ripley* v. *Gelston*, 9 Johns. 201); or to give up goods till illegal duties are paid (*Elliott* v. *Swartwout*, 10 Pet. [U. S.] 137); or where a carrier refuses to give up goods till excessive freight is paid (*Garton* v. *Bristol Railway*, 1 Best & Sm. 112; *Lancashire, etc., Railway* v. *Gidlow*, L. R., 7 H. L. Cas. 517; 13 Eng. R. 40; *Scholey* v. *Mumford*, 60 N. Y. [15 Sick.] 498; *Meek* v. *McClure*, 49 Cal. 624); or where illegal toll is demanded. *Chase* v. *Dwinal*, 7 Me. 134. There are also many cases in which a court of chancery relieves against contracts entered into under a compulsion which is not sufficient to avoid them at law. Not only contracts but admissions made under duress are void and cannot be used against the party making them. *Tilley* v. *Damon*, 11 Cush. 247.

§ 8. **When it does not avoid a contract. Ratification.** When any of the elements which are involved in the definition of duress are wanting, duress will not be a defense. Thus the party attempting to enforce a contract may, in answer to a defense of duress, deny the force or threat, or, admitting it, deny that it caused the contract, or, admitting it, allege that when the duress had ceased the defendant ratified the contract. The first two answers are sufficiently explained in considering what is or what is not duress (*ante*, pp. 650, 653, §§ 2, 3), for they amount to a general denial. In the third case ratification if proved would be a good defense, for the contract is voidable only. Thus if a party under duress makes an assignment of property, and after being released and with a full knowledge of his rights and of the facts remains for a long time silent and allows a sale under the assignment, it will amount to a ratification. *Doolittle* v. *McCullough*, 7 Ohio St. 299; *Lyon* v. *Waldo*, 36 Mich. 345.

So if one makes an obligation by duress and afterward when he is at liberty, takes a defeasance on it. Shep. Touch. 62, 288. So if in England a man acknowledges a bargain and sale of lands in the court where the deed is to be enrolled, or before the officer who makes the enrollment and it is enrolled, he cannot afterward plead duress. 1 Rolle's Abr. 862. And where a *feme covert* acknowledges a deed exe-

cuted by her on a private examination before a magistrate, where such examination is necessary, it has been laid down that it cannot be avoided for duress. *Bissett* v. *Bissett*, 1 Har. & McH. 211. But this was overruled in *Central Bank* v. *Copeland*, 18 Md. 319. In these cases actual inquiry is instituted as to the will of the party before a tribunal which has power to protect them. But where the acknowledgment is a mere formal matter, it does not estop the party or his heirs from setting up duress. *Worcester* v. *Eaton*, 13 Mass. 371. It is always held, however, that if a party under duress promise for the purpose of regaining his liberty to execute a bond or other instrument, and afterward while at liberty perform his promises it is nevertheless voidable. *Ormes* v. *Beadel*, 2 DeG. F. & J. 333. It is not enough that some act in ratification is done. It must appear that the duress or fear has ceased, which may not be till long after the threats are made. *Taylor* v. *Jaques*, 106 Mass. 291. In case of a marriage procured by threats of arresting for fornication or bastardy, if the parties afterward live together, it amounts to a ratification and the marriage can no longer be avoided. *Hampstead* v. *Plaistow*, 49 N. H. 84. If the person subjected to duress has received any valuable consideration for the contract, it would seem that he cannot escape from his contract till he has returned such consideration according to the rule in other cases of the rescission of voidable contracts. The title of a *bona fide* purchaser for value of property obtained by duress is protected, especially where the attempt to reclaim it is delayed for three years. *Bazemore* v. *Freeman*, 58 Ga. 276. The duress must be at the instigation of the grantee, for where a husband forced his wife to sign a mortgage, but the mortgagee was innocent of any wrong, his rights were not affected by the duress. *Green* v. *Scranage*, 19 Iowa, 461; *Talley* v. *Robinson*, 22 Gratt. (Va.) 888.

§ 9. **When it excuses a tort.** In an action against a person to recover damages for taking and converting to his own use a horse belonging to the plaintiff, the defendant may excuse himself by proof that he was a soldier and acted under orders of his superior officers, if the orders and circumstances were such as amounted to duress under which he was forced against his will to participate in the wrong. *Weatherspoon* v. *Woodey*, 5 Coldw. (Tenn.) 149; *Olivari* v. *Menger*, 39 Tex. 76. Duress, where it is such as to overcome the will of a person of reasonable firmness, may also take away the guilt of many crimes and misdemeanors. *Morgan* v. *State*, 3 Sneed (Tenn.), 475. Thus, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in time of peace. 1 Hal. P. C. 50. On a

trial for burglary by two children, under the compulsion of their father, it was held that the jury might find that such compulsion existed although he was at a distance at the time. *State* v. *Learnard*, 41 Vt. 585. In all cases where the wrongful intent is an element of the crime, evidence of duress would be competent on the issue of the existence of such intent.

§ 10. **Who may interpose the defense.** The person who has executed the contract or paid money under duress may usually interpose this defense. So may also those who represent him at law, or who are grantees of the right or estate which is the subject of the disputed contract. It is held in several cases, that duress of the principal in an obligation is a good plea for the sureties. *State* v. *Brantley*, 27 Ala. 44; *Osborn* v. *Robins*, 36 N. Y. 365; *Evans* v. *Huey*, 11 Bay (S. C.), 13; *Fisher* v. *Shattuck*, 17 Pick. 253. See *post*, p. 663, § 13. Especially would this be so in case of obligations and bonds given in the course of fraudulent legal proceedings, for in such case the bond derives its validity from the prior steps taken, and when these fail it would fail. *Thompson* v. *Lockwood*, 15 Johns. 256; *Fay* v. *Oatley*, 6 Wis. 42; *Governor* v. *Williams*, Dud. (Ga.) 424. But in other cases the contrary is held to be the law. See § 11. It is the personal right and privilege of the person under duress to avoid the contract. He may allow it to stand if he chooses, and his creditors cannot claim the right. *Lewis* v. *Bannister*, 16 Gray, 500. A principal or a bailor has sometimes been allowed to set up the duress of the agent or bailee. *Cummings* v. *Ince*, 11 Q. B. 112; *Koehler* v. *Wilson*, 40 Iowa, 183.

§ 11. **Who may not.** Duress cannot be pleaded by a stranger to it. *McClintick* v. *Cummins*, 3 McLean (C. C.), 158. The duress which will avoid a contract must be offered to the party who seeks to take advantage of it. *Mantel* v. *Gibbs*, 1 Brownl. 64; *Huscombe* v. *Standing*, Cro. Jac. 187; *Wayne* v. *Sands*, Freem. 351; *Steinbacker* v. *Wilson*, 1 Leg. Gaz. (Penn.) Rep. 76. To this rule there is an exception in case of husband or wife. See *ante*, § 2, p. 652, *ad. fin.* "He only should be allowed to avoid his contract upon whom the unlawful restraint or fear has operated. The contract of a surety if of his own free will, and executed without coercion or menace, should be held binding. It may excite his feelings, awaken his generosity, and induce him to act from motives of charity and benevolence toward his neighbor, but these can furnish no valid ground of defense against his contract, which he has entered into freely and without coercion." *Robinson* v. *Gould*, 11 Cush. 58. Sureties upon a recognizance cannot plead the duress of their principal, in discharge of their own liability. *Plummer* v. *People*, 16 Ill. 358.

These principles have been questioned in some cases. *Ante*, p. 662, § 10. The right is personal to the person injured. Neither strangers nor any of his creditors have the like right. Therefore, where a debtor had parted with his property under duress, neither an officer who attaches it as his, nor his creditors, can take advantage of the wrong. *Lewis* v. *Bannister*, 16 Gray, 500. In some cases not even the person wronged can set up the duress. He may estop himself from doing so. He may lose the right by long delay during which innocent parties have acquired rights in the matter, which cannot be overlooked. He may have ratified the contract. See *ante*, p. 660, § 8. If the contract is a promissory note, he cannot set up this defense against an innocent holder for value, who took the paper before maturity *Clark* v. *Pease*, 41 N. H. 414.

§ 12. **How interposed.** As the contract is only voidable, the person subjected to duress must proceed to avoid it as in other cases of contracts procured by fraud. If he has received any thing of value, he must return it, or at least tender it back. But, where a party was induced by threats to settle a groundless suit, and take a discharge of it, it was held that it was not necessary to give notice to the other party, or to return the discharge, the discharge not being property of any value to the other party, or of any use to him. *Foss* v. *Hildreth*, 10 Allen, 80.

When these preliminary steps are taken, the party is prepared to reclaim any thing with which he may have parted, or to resist any claim made upon himself. If sued, the duress must be pleaded, for the other party has a *prima facie* case. At common law evidence of duress was admitted under the general issue in assumpsit (*Whelpdale* v. *Whelpdale*, 5 Co. 119, *b*, note *c*); but in debt it was necessary to plead it specially. *Edwards* v. *Brown*, 1 Tyrw. 207.

Under the codes, the facts showing duress must be pleaded. The court must be able to see from the facts stated that the payment was, in fact, compulsory, or that the party entered into the contract under duress. It is not sufficient to allege in a general way that the payment was compulsory and not voluntary. *Commercial Bank* v. *City of Rochester*, 41 Barb. 341; S. C., 41 N. Y. 619.

§ 13. **Relief in equity.** The constant rule in equity is that where a party is not a free agent and is not equal to protecting himself, the court will protect him. *Evans* v. *Llewellin*, 1 Cox, 340; *Crowe* v. *Ballard*, 1 Ves. Jr. 215. On this account courts of equity watch with extreme jealousy all contracts made by a party while under imprisonment, and if there is the slightest ground to suspect oppression or imposition in such cases, they will set the contracts aside or restrain their

enforcement. *James* v. *Roberts*, 18 Ohio, 548; *Roy* v. *Beaufort*, 2 Atk. 190; *Underhill* v. *Horwood*, 10 Ves. 219. Circumstances also of extreme necessity and distress of the party, although not accompanied by any direct duress or restraint, may, in a like manner, so entirely overcome his free agency as to justify the court in setting aside a contract made by him on account of some fraud or fraudulent advantage attendant upon it. *Pickett* v. *Loggon*, 14 Ves. Jr. 215; *Gould* v. *Okeden*, 4 Bro. Par. 198; *Beasley* v. *Magrath*, 2 Sch. & Lefr. 35. Where a wife, induced by fear of a prosecution of herself and her husband for embezzlements from his employer, the proceeds of which had gone into their homestead, executed a deed thereof to the employer, the court gave her her election to have the deed set aside upon her paying him the debt with the value of improvements made since, or to have the deed affirmed and receive the value deducting the debt. *Gohegan* v. *Leach*, 24 Iowa, 509. The court will sometimes relieve against a conveyance executed by one under arrest on due process. *Nicholls* v. *Nicholls*, 1 Atk. 409. Where a grant of an annuity was fraudulently obtained by a person having a spiritual ascendancy over a woman who was under a state of religious delusion, it was set aside on principles of public policy. *Norton* v. *Relly*, 2 Eden, 286. Where an execution was taken in violation of agreement, and the plaintiff threatened to close up the defendant's business which would ruin him, the court interfered to restrain a levy. *Thurman* v. *Burt*, 53 Ill. 129. Where there was delay of twelve years in asking relief, during which time valuable improvements had been made on the property, relief was barred. *Murphy* v. *Paynter*, 1 Dill. (C. C.) 333. So of a delay of seven years (*Davis* v. *Fox*, 59 Mo. 125); or even if the party has recognized the contract as valid for two years. *Lyon* v. *Waldo*, 36 Mich. 345. Clear and conclusive evidence is required especially where there has been delay. *Davis* v. *Fox*, 59 Mo. 125.

# CHAPTER XX.

## EASEMENT.

### ARTICLE I.

#### RIGHT OF, AS A DEFENSE.

**Section 1. In general.** The right to an easement justifies the party in all acts necessary to its reasonable enjoyment. He is also to be protected in all acts necessary and legal to secure his right from interruption, injury or destruction, and these he may do whether the danger to his rights arises from natural causes, as the decay of a building in which he has a right of support, or the carrying away of a dam by which he enjoys the easement of flowage, in which cases he may enter the servient premises to repair the injury (*Frailey* v. *Waters*, 7 Penn. St. 221); whether it arises from the wrongful act of the owner of the servient premises, or of a stranger as where a right of common is obstructed by a dwelling-house, in which case he may enter and tear it down (*Perry* v. *Fitzhowe*, 8 Q. B. 757. See S. C. *post*, pp. 666, 669); so of a mill dam (*Adams* v. *Barney*, 25 Vt. 225); or where a well in which he has right is filled up, when he may enter and clear it out (*Ballard* v. *Butler*, 30 Me. 94); or where a house or wall is erected so near him that it stops his ancient lights, when he may enter and pull it down. 3 Blacks. Com. 5. And as against the party doing the wrong, it is immaterial that such entry and abatement is violent and riotous, but he may not do more injury than is necessary to the enjoyment and vindication of his right, and he cannot defend as to any excess, but will be liable in damages therefor. *Heath* v. *Williams*, 25 Me. 209.

§ 2. **When a defense.** The easement when established by proper proof is a defense to any action brought for acts done in the course of enjoyment of the right. Thus, the owner of a right of way may pass over it, or, if the way itself is made impassable by the act of the owner of the fee without his fault, he may go outside of the way. *Leonard* v. *Leonard*, 2 Allen (Mass.), 543; *Holmes* v. *Seeley*, 19 Wend. (N. Y.) 507; *Kent* v. *Judkins*, 53 Me. 160; *ante*, p. 361. But in *Williams* v. *Safford*, 7 Barb. 309, it is denied that the owner of a private

way has a right to go upon other land than the way itself, although the owner of the land shall have put obstructions in the way, for the law gives the owner of the way no remedy but by abating the nuisance or by an action for damages. *Bakeman* v. *Talbot*, 31 N. Y. (4 Tiff.) 372; *Bullard* v. *Harrison*, 4 M. & S. 387; *Miller* v. *Bristol*, 12 Pick. (Mass.) 550. The extent of the enjoyment is determined by the construction of the grant.

Thus, the owner of a right of way to a warehouse is justified in placing on the ground goods brought to the warehouse, or to be carried from it, and keeping them there a reasonable time, and what was a reasonable time would depend on many circumstances, and would ordinarily be a question for the jury. *Appleton* v. *Fullerton*, 1 Gray (Mass.), 186. The only question arising in such cases is what are the legal limits of the right. This is determined by a construction of the grant, express or implied, on which the right is founded, and for this, see title *Easements*, Vol. II. In other cases it may be necessary for the person claiming the easement to do acts in their nature trespasses against the owner of the fee which he must justify under his right, although they are not in the course of enjoyment. When his right is disturbed by erections which interfere with its exercise, he may enter upon the land and abate them, not only because they so interfere and deprive him of a present right, but because, if he allows them to remain, a presumption will be raised against his right, either of its nonexistence, or its abandonment. *Perry* v. *Fitzhowe*, 8 Q. B. 757; *Great Falls Co.* v. *Worster*, 15 N. H. 412; *Adams* v. *Barney*, 25 Vt. 225; *Amick* v. *Tharp*, 13 Gratt. (Va.) 564; *Rhea* v. *Forsyth*, 37 Penn. St. 503; *McCord* v. *High*, 24 Iowa, 348; *Jewell* v. *Gardiner*, 12 Mass. 311. If the obstruction is the act of a stranger, he can only recover his enjoyment by an entry and abatement. *Saxby* v. *Manchester, etc., R. R.*, L. R., 4 C. P. 198; 38 L. J. (N. S.) C. P. 153. While, as we shall see, he must be careful to do no unnecessary damage, he can do all that is necessary to vindicate his right. If the obstruction cannot be divided, he may destroy the whole. *Elliott* v. *Rhett*, 5 Rich. (S. C.) L. 405. Thus, where two persons own estates divided by a stream, and one erects a dam across it and flows the land of the other owner, he may open a passage in the dam, though the whole pond escape, and the remainder of the dam is made worthless. *Adams* v. *Barney*, 25 Vt. 225; *Merritt* v. *Parker*, Coxe (N. J.), 460. He may also consider the rights of third persons, and where water was discharged from a mine and ran over his land, he may stop it near the mine, although such stoppage was much more injurious to the mine owner than one below, but the latter would have injured other persons. *Roberts* v. *Rose*, L. R., 1 Exch. 82.

The owner of the easement may also anticipate actual injury in some cases, and abate any erection which it is certain will interfere with his right. Thus, if a dam is erected which must, when filled, flow his land, he will be justified in abating it without waiting for the gates to be closed. *Company* v. *Goodale*, 46 N. H. 56. He may also assert his right, in order to protect it from being lost by adverse claims. The duty rests on him to keep the erections or things by which he enjoys his right, in repair, and this duty carries with it the right at all reasonable times to enter the servient tenement and make repairs. *Duncan* v. *Louch*, 6 Q. B. 904; *Prescott* v. *Williams*, 5 Metc. (Mass.) 429; *Williams* v. *Safford*, 7 Barb. 309; *Gillis* v. *Nelson*, 16 La. Ann. 279. Thus, the grantee of a way can make it, as well as repair it afterward. *McMillen* v. *Cronin*, 13 Hun, 68; *Osborn* v. *Wise*, 7 Car. & P. 761; *Atkins* v. *Bordman*, 2 Metc. (Mass.) 457. So, where a deed conveyed the right to draw water from a spring, the grantee may make such arrangements about the spring as are reasonably necessary to enable him to use the water. *Stevenson* v. *Wiggin*, 56 N. H. 308. So, the right to flow gives the right to enter and erect and repair the dam and cleanse the pond. *Frailey* v. *Waters*, 7 Penn. St. 221. The grant of a parcel of land abutting on a way gives a right to enter and use the sand, gravel and materials in grading, fitting and repairing it. *Phillips* v. *Bowers*, 7 Gray (Mass.), 21. The grant of a way gives the grantee the right to make it dry and safe for use in the manner most convenient for himself, provided he cause no inconvenience to the owner of the fee. *Gerrard* v. *Cooke*, 2 Bos. & P. (N. R.) 109; *McMillen* v. *Cronin*, 20 N. Y. S. C. (13 Hun) 68. Where the grant was of a right of way to carry coals, the grantee may lay down such tracks as are usually adopted for that purpose, they being reasonably necessary. *Senhouse* v. *Christian*, 1 T. R. 560. But he cannot deprive the owner of his right to the materials, except so far as he has need to use them in the construction or repair of the way, canal, or other structures necessary to his easement. *Smith* v. *Rome*, 19 Ga. 92; *Brown* v. *Stone*, 10 Gray (Mass.), 65; *Maxwell* v. *McAtee*, 9 B. Monr. (Ky.) 20; *Bean* v. *Coleman*, 44 N. H. 539; *Lyman* v. *Arnold*, 5 Mas. (U. S.) 198. While a parol grant will not create an easement it may be available to the person who has attempted to enjoy it, as a license. *Cayuga Railway* v. *Niles*, 20 N. Y. S. C. (13 Hun) 170.

§ 3. **When not a defense.** The easement will not protect the owner of it in any acts which are in excess of his right. Thus a way cannot be used to reach any land, except the dominant estate. The owner of the easement cannot go out of his way, nor use that way to go to any other place, or even to go to the dominant estate unless he makes

that his terminus, an except for the purpose defined in the grant. *French* v. *Marstin*, 24 N. H. 451. Where the easement was created by implication of law, upon the division of a lot into several tracts, the right appurtenant to one tract cannot be enjoyed in connection with another. *Springer* v. *McIntyre*, 9 W. Va. 196. If the way is for agricultural purposes, the owner is a trespasser if he use it as a road over which to draw minerals. *Bradburn* v. *Morris*, L. R., 3 Ch. D. 812; S. C., 18 Eng. 847.

A way for carriages cannot justify a passing with cattle; nor a way for oxen, a driving of pigs. *Bullard* v. *Dyson*, 1 Taunt. 279. A grant of a foot way will not protect one who carries manure over it in a wheelbarrow. *Brunton* v. *Hall*, 1 Q. B. 792. A right to draw water from a river does not give the right to draw goods over the same path. *Knight* v. *Woore*, 3 Bing. N. C. 3. The owner of the easement is a trespasser if he piles lumber on land over which he has only the right of way to his saw-mill. *Kuler* v. *Beaman*, 49 Me. 207. He may also fail in his defense, because his use, though in its nature lawful, is excessive. Thus, in case of successive riparian owners, each must so restrict his use as not to substantially impair the equal right of others below him. *Cummings* v. *Barrett*, 10 Cush. (Mass.) 186; *Thomas* v. *Brackney*, 17 Barb. 654; *Parker* v. *Hotchkiss*, 25 Conn. 321; *Hendrick* v. *Cook*, 4 Ga. 241; *Mabie* v. *Matteson*, 17 Wis. 1. Thus he may carry the pollution of the stream beyond reason and so expose himself to an action. *Honsee* v. *Hammond*, 39 Barb. 95; *Nuttall* v. *Bracewell*, L. R., 2 Exch. 9; *Howell* v. *McCoy*, 3 Rawle (Penn.), 256; *Davis* v. *Getchell*, 50 Me. 604; *Phœnix Water Co.* v. *Fletcher*, 23 Cal. 482. But where the owner of a building had the right to use a drain, an increased use was held not to subject him to an action, the drain being of ample size and no injury done. *Flint* v. *Bacon*, 20 N. Y. S. C. (13 Hun) 454. Where the right is rather a *profit a prendre* than an easement as a right to mow and cultivate land, it does not run with the land to the purchaser and will not protect him. *Pierce* v. *Keator*, 70 N. Y. (25 Sick.) 419. He may also expose himself to damages in attempting to protect his rights, as where he carries his abatement farther than the erection is clearly unlawful. *Hutchinson* v. *Granger*, 13 Vt. 394. A person cannot abate a public nuisance which is not a peculiar injury to him personally. *Clark* v. *Lake St. Clair Ice Co.*, 24 Mich. 508; *McGregor* v. *Boyle*, 34 Iowa, 268; *Dimes* v. *Petley*, 15 Q. B. 283. If a dam is built higher than the right of its owner justifies, the person injured can only abate the excess. *Heath* v. *Williams*, 25 Me. 209. If an easement of light is obstructed, its owner will not be protected if he abates more of the obstruction than is

necessary to restore his enjoyment. *Dyer* v. *Depui*, 5 Whart. (Penn.) 584. He cannot abate the nuisance at an unreasonable time, causing unnecessary damage. *Perry* v. *Fitzhowe*, 8 Q. B. 757, 776; *Burling* v. *Read*, 11 id. 904. Whether the mode of removal was reasonable is for the jury on all the evidence. *Morrison* v. *Howe*, 120 Mass. 571. If there are two ways in which he may protect himself, and one of them is less injurious to the owner of the land than the other, he must adopt that, provided no rights of third persons intervene. *Roberts* v. *Rose*, L. R., 1 Exch. 82.

He must wait till he is actually injured in his property or his rights, and where the structure is capable of a rightful use as well as a wrongful one, he may not assume that the wrongful use will be that adopted. *Norris* v. *Baker*, 1 Rolle, 393; *Jones* v. *Powell*, Palm. 536. The rights of third persons and the public take the precedence of any rights of the wrong-doer. *Roberts* v. *Rose*, L. R., 1 Exch. 82. The person who abates the nuisance must not do any injury to the property of third persons. Thus, where a city turned the course of water from a spring, so that it ran upon the defendant's land, he is liable if in stopping it he causes it to flow back upon the land of another. *Amick* v. *Tharp*, 13 Gratt. (Va.) 564. If, where the nuisance complained of was a dwelling-house, which interfered with the rights of a commoner, it was held that he might not abate it while actually occupied, because of the almost necessary risk of life and breach of the peace. And if it had been erected by another person than the occupant, the party injured should give notice to the owner and request him to remove it before proceeding to abate it himself. *Perry* v. *Fitzhowe*, 8 Q. B. 757; *Davies* v. *Williams*, 16 id. 546; *Jones* v. *Williams*, 11 M. & W. 176; *Burling* v. *Read*, 11 Q. B. 904. In cases of easements shared in common by different owners, each party's enjoyment is limited by the rights of the others, and neither may appropriate the whole benefit. Thus, if two owners share a party-wall, neither can so use it as to inflict a substantial injury upon the other, nor can he remove it, destroy it or appropriate it exclusively to his own use. *Price* v. *McConnell*, 27 Ill. 255. He cannot pare off the part on his own land so as to render the remainder of the wall unsafe, nor can he excavate under it. *Eno* v. *Del Vecchio*, 4 Duer (N. Y.), 53; S. C., 6 id. 17; *Hieatt* v. *Morris*, 10 Ohio St. 523; *Phillips* v. *Bordman*, 4 Allen (Mass.), 147. If he undertakes to improve or repair it, he will be liable for any injury caused by negligence or unskillfulness. *Bradbee* v. *Christ's Hospital*, 4 Mann. & Gr. 761; *Webster* v. *Stevens*, 5 Duer (N. Y.), 556; *Dowling* v. *Hennings*, 20 Md. 179. He cannot pull it down in order to build himself a new and larger house, where his own had fallen into decay. *Potter* v. *White*, 6 Bosw. (N. Y.)

644, 647. So, where there is a joint easement of way, one owner cannot use it to the exclusion of another. If the easement is in a spring or well, one owner cannot put a pipe in which will drain it and leave the others interested no water. *McLellan* v. *Jenness*, 43 Vt. 183; 5 Am. Rep. 270.

Where the banks of a stream are owned by different proprietors, each must regard the rights of the other. Neither owner becomes the owner of any distinct portion of the water flowing in the stream. Each is bound to use it as an entire stream in its natural channel, and must use it as it is accustomed to flow in the channel. *Canal Trustees* v. *Havens*, 11 Ill. 554; *Vandenburgh* v. *Van Bergen*, 13 Johns. 212; *Pratt* v. *Lamson*, 2 Allen (Mass.), 275. In case of running streams, where other owners above and below have equal rights, they must conform to the rule *sic utere tuo, ut alienum non lædas.* No proprietor can use the water to the prejudice of another. No one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon the proprietor above. *Tyler* v. *Wilkinson*, 4 Mason (U. S.), 397; *Embrey* v. *Owen*, 6 Exch. 353; *Gould* v. *Boston Duck Co.*, 13 Gray (Mass.), 442; *Twiss* v. *Baldwin*, 9 Conn. 291; *Platt* v. *Johnson*, 15 Johns. 213; *Davis* v. *Getchell*, 50 Me. 604; *Hayes* v. *Waldron*, 44 N. H. 584; *Bliss* v. *Kennedy*, 43 Ill. 71. If he exceeds the right determined by these principles, his easement will not avail him as a defense. So, he cannot defend the corruption of the water, as where the defendant was the owner of a tan-yard, and threw bark, hair and filth into the stream, which were carried to the plaintiff's mill below. *Honsee* v. *Hammond*, 39 Barb. 89. Nor in mining can he mix mud or other material with the water to the injury of others below. *Phœnix Water Co.* v. *Fletcher*, 23 Cal. 481; *Baxendale* v. *McMurray*, L. R., 2 Ch. App. 790. Nor can he foul it with dyestuffs and chemicals. *Crossley* v. *Lightowler*, L. R., 3 Eq. 297; S. C., L. R., 2 Ch. App. 478; *Stockport Waterworks* v. *Potter*, 7 H. & N. 160. He cannot change the temperature of the water flowing across his land. 2 Rolle's Abr. 141. He must submit to any reasonable regulations of the enjoyment of his right, like gates or bars upon a private way. *Baker* v. *Frick*, 45 Md. 337; 24 Am. Rep. 506; *Garland* v. *Furber*, 47 N. H. 301.

§ 4. **Who may interpose it.** The owner of the dominant tenement may set up the existence of the easement as a defense in the cases which we have been considering, and this equally whether he is the person who first gained the easement, or a purchaser of the dominant estate from him. *Hills* v. *Miller*, 3 Paige (N. Y.), 254; *Whitney* v. *Lee*, 1 Allen (Mass.), 198; *Wilder* v. *St. Paul*, 12 Minn. 204. As the ease-

ment protects such owner in all acts within his right, so it also protects all servants and licensees who are within the right. Thus, in cases of repair, to preserve his easement, as by cleaning out ditches, or repairing walls, he may cause the work to be done by others, and the owner of the servient tenement cannot hold them liable. In cases of the enjoyment of easements, the limits will be defined by the right itself but would usually include servants. Thus the owner of a right of way for carriages may use such way by his servant as well as in person. In many other cases the tenant lawfully in possession is entitled to the enjoyment of all easements appurtenant to the demised premises, and this whether the easement is gained by prescription or by contract. *Smith* v. *Kinard*, 2 Hill's (S. C.) L. 642. A landlord, though he has parted with the possession of the dominant estate by a demise to his tenant, may use the way to view waste, demand rent, and remove obstructions from the premises. *Proud* v. *Hollis*, 1 B. & C. 8.

§ 5. **How interposed.** The defense that acts complained of were done under a right of easement is in its nature a defense in confession and avoidance. The plea or answer must set out the right claimed with substantial accuracy. It should also state how the right was created, whether by deed, or prescription, in order that the other party may be prepared to meet the claim. *Carter* v. *Augusta Road Co.*, 1 Wils. (Ind.) 14. In setting up an easement by prescription, the same particularity is to be observed, as if the claim was by express grant. *Wright* v. *Rattray*, 1 East, 377; *Slowman* v. *West*, Palm. 387; *Colchester* v. *Roberts*, 4 Mees. & W. 769. Where the defendant pleaded a general way for all purposes, but the jury found that the way existed only for the cartage of wood and timber, the plaintiff was held entitled to a general verdict, because it was not averred that he was using the way for wood or timber at the time. *Higham* v. *Rabett*, 5 Bing. N. C. 622. In claiming a prescriptive way, it is not enough to say that the way has been used for twenty years, but it must be alleged that the use was as of right. *Holford* v. *Hankinson*, 5 Q. B. 584; *Onley* v. *Gardiner*, 4 Mees. & W. 496. Under the modified rules of pleading, the same strictness is not necessary. It would be sufficient, if the defendant states his title to the dominant estate, the nature of the right of easement claimed with it, the title on which such right rests, and then brings the acts complained of within that right by such further allegations concerning them as may be necessary, in addition to the description in the plaintiff's complaint. *Carter* v. *Augusta Road Co.*, 1 Wils. (Ind.) 14.

# CHAPTER XXI.

## EQUITABLE DEFENSES.

### ARTICLE I.

#### OF EQUITABLE DEFENSES IN GENERAL.

**Section 1. Definition and nature.** The employment of *equitable defenses* to actions, brought to enforce legal rights and to obtain legal remedies, results from the modern abolition of the distinction between actions at law and suits in equity. Thus, under the present judiciary system of New York, the functions of the courts of common law and of chancery are united in the same court, and the distinctions between actions at law and suits in equity, and the forms of all such actions and suits, are abolished, and the defendant may set forth by answer as many defenses as he may have, whether they be such as have been heretofore denominated legal or *equitable*, or both. It was the intent of the legislature, that all controversies respecting the subject-matter of the litigation should be determined in one action, and the provisions of the statute are adapted to give effect to that intent. And it is there held that, under the head of *equitable defenses* are included all matters which would before have authorized an application to the court of chancery for relief against a legal liability, but which, at law, could not have been pleaded in bar. *Dobson* v. *Pearce*, 12 N. Y. (2 Kern.) 156. When an action is prosecuted, the inquiry is, whether, taking into consideration all the principles of law and equity bearing upon the case, the plaintiff ought to recover. Id. See, also, *Mandeville* v. *Reynolds*, 68 N. Y. (23 Sick.) 528, 545.

But the English statute of 17 & 18 Vict. c. 125, by which it was enacted that an equitable defense might be pleaded in an action at law, is less liberally construed; and it is held by the English courts that the statute enables a defendant to plead, by way of defense, facts entitling him to relief on equitable grounds, only where the facts would entitle him to an absolute and a perpetual injunction in equity against the judgment in the action, and not merely to a temporary or a conditional injunction. *Wodehouse* v. *Farebrother*, 5 El. & Bl. 277. And see *Hunter* v. *Gibbons*, 1 Hurl. & N. 459; *Phelps* v. *Prothero*, 16 C.

B. 370; *Flight* v. *Gray*, 3 C. B. (N. S.) 320. The doctrine has likewise been held by some of the American courts, that the statute, which allows equitable defenses to action at law, should be confined in its operation to those cases in which a court of equity, if its jurisdiction were invoked by action, would restrain or limit the suit at law, and grant equitable relief against it. See *Cramer* v. *Benton*, 60 Barb. 216; S. C., 4 Lans. 291; *Lombard* v. *Cowham*, 34 Wis. 486; *Conger* v. *Parker*, 29 Ind. 380; *Hills* v. *Sherwood*, 48 Cal. 386. So, it is held by the court in Minnesota, that an equitable defense in an action to recover land must be so strong and clear an equitable title in the defendant, as, in the absence of fraud or mistake, to entitle him to a decree for a conveyance on a bill for that purpose. *McClane* v. *White*, 5 Minn. 178. But nowithstanding these decisions and some others of a similar import, the better doctrine is believed to be in accordance with the definition of equitable defenses above given. The question now is, ought the plaintiff to recover? and any thing which shows that he ought not is available to the defendant, whether it was formerly of equitable or legal cognizance. JOHNSON, J., in *Dobson* v. *Pearce*, 12 N. Y. (2 Kern.) 156. And see *Blake* v. *Buffalo Creek R. R. Co.*, 56 N. Y. (11 Sick.) 485; *Ferguson* v. *Crawford*, 70 N. Y. (25 Sick.) 253.

§ 2. **What matters are equitable defenses.** There would not, therefore, seem to be any limit to the employment of equitable defenses, other than is found in the very nature of equity jurisprudence itself.

A few instances will serve to illustrate the application of the doctrine. In an action to recover damages for the breach of a covenant against incumbrances, the defendant may set up, as an equitable defense, that the incumbrance referred to, as constituting the breach of the covenant, was, by mistake, omitted to be excepted from its operation. *Haire* v. *Baker*, 5 N. Y. (1 Seld.) 357. So, in an action brought to recover damages for the non-performance of an executory contract, the answer alleged a mistake in drawing the contract by which a provision was omitted that would have excused the defendant's failure to perform, and prayed a reformation, and the court sustained the defense and granted the reformation. *Pitcher* v. *Hennessey*, 48 N. Y. (3 Sick.) 415. See, also, *Maher* v. *Hibernia Ins. Co.*, 67 N. Y. (22 Sick.) 283; *Wood* v. *Dwarris*, 11 Exch. 493. Where, in an action to recover a balance on a note, the answer alleged that the note "was by mistake given for a greater sum than was due from the maker to the payee, to wit, a sum sufficient to cancel the balance claimed," and issue was taken thereon by the reply; it was held that the defendant was entitled to prove under the pleadings that the note was given on a settlement of

accounts, and by mistake was for a larger amount than the sum actually due. *Seeley* v. *Engell*, 13 N. Y. (3 Kern.) 542. See *Manuf. Nat. Bank* v. *Russell*, 6 Hun (N. Y.), 375. In an action upon a judgment recovered against the defendant, the latter may allege and prove as a defense that it was obtained by fraud (*Dobson* v. *Pearce*, 12 N. Y. [2 Kern.] 156); or he may set up, by way of defense, any matter which would be ground of relief in equity against the judgment. *Ferguson* v. *Crawford*, 70 N. Y. (25 Sick.) 253; *Mandeville* v. *Reynolds*, 68 N. Y. (23 Sick.) 528.

Equitable defenses are, perhaps, most frequently interposed to actions brought to recover the possession of land. If a defendant, in such an action, shows an equitable right to the possession of the premises, as against the plaintiff, judgment should be given for him. *Thurman* v. *Anderson*, 30 Barb. 621; *Lamont* v. *Cheshire*, 65 N. Y. (20 Sick.) 30, 42. An answer setting up a mortgage of the land in question, given by the plaintiff or his predecessors, default in payment of the debt secured thereby, and possession of the land by the defendant under the mortgagee, states a good equitable defense to an action brought to recover possession of the premises. *Hubble* v. *Vaughan*, 42 Mo. 138; *Harrington* v. *Fortner*, 58 id. 468, 474; *Hammond* v. *Perry*, 38 Iowa, 217; *Maxwell* v. *Campbell*, 45 Ind. 360. So, in an action to recover possession of land, the defendant may set up as a defense that the land in question was intended to be conveyed to him by a deed from the plaintiff, but by a mistake in the description it was not included. And a reformation of the deed is not necessary, but the same facts which will entitle the defendant thereto will establish his equitable right to possession, and constitute a defense as effectual as the legal title. *Hoppough* v. *Strubble*, 60 N. Y. (15 Sick.) 430. In *Cavalli* v. *Allen*, 57 N. Y. (12 Sick.) 508, it was held that the vendee in possession may set up as an equitable defense the same equitable rights which he could have enforced had he brought an action for specific performance. See *Onson* v. *Cown*, 22 Wis. 329; *Harris* v. *Vinyard*, 42 Mo. 568; 6 Am. Rep. 624; *Cythe* v. *La Fontain*, 51 Barb. 186; *Love* v. *Watkins*, 40 Cal. 547.

§ 3. **What are not such.** In England, a defendant cannot plead an equitable defense to an ejectment, under the Common Law Procedure Act. *Neave* v. *Avery*, 16 C. B. 328. Nor will the court allow any plea or replication on equitable grounds where it does not appear to them that there is any ground for equitable relief. *Hunter* v. *Gibbons*, 1 Hurl. & N. 459; *Flight* v. *Gray*, 3 C. B. (N. S.) 320. Nor will a party be allowed to plead, on equitable grounds, facts which he has, pending the action, set up in a court of equity as entitling him to

relief, in a proceeding instituted there with reference to the subject-matter of the action. *Schlumberger* v. *Lister*, 2 El. & El. 855.

It is held that a bill to quiet title filed by the defendant in an action of ejectment is not an equitable defense to the plaintiff's cause of action. *Doyle* v. *Franklin*, 40 Cal. 106. So, the equitable ownership of land by the defendant is held not to be a good defense to an action for trespasses on the land in possession of the plaintiff. *Creager* v. *Walker*, 7 Bush (Ky.), 1.

In Wisconsin, the statute expressly requires the defendant, in pleading an equitable defense, to demand such *affirmative* relief as he is entitled to. *Lombard* v. *Cowham*, 34 Wis. 486; *DuPont* v. *Davis*, 35 id. 634. So, it is well settled by the California decisions that, in interposing an equitable defense, the defendant becomes an *actor*, and the defense interposed a pleading in equity; the sufficiency of which, in matter of substance, though not in point of mere form, is to be determined by the application of the rules of pleading observed in courts of equity in cases of like character. *Bruck* v. *Tucker*, 42 Cal. 346; *Hills* v. *Sherwood*, 48 Cal. 386. And, in ejectment, the legal title will prevail against an equitable one, if no equitable defense is pleaded. *Hartley* v. *Brown*, 51 id. 465. In New York, facts pleaded may constitute a good equitable defense without affirmative relief being asked or granted. *Chase* v. *Peck*, 21 N. Y. (7 Smith) 581. And see *ante*, p. 672, § 1.

§ 4. **In what actions.** As it regards the actions to which equitable defenses may be interposed, and the persons who may interpose them, see *ante*, p. 673, § 2. A vendee in possession under an executory contract, the conditions of which have been performed on his part, may avail himself of his equitable title as a defense to an action of ejectment brought against him by the holder of the legal title. *Love* v. *Watkins*, 40 Cal. 547; 6 Am. Rep. 624.

Where the owner of land sold the same, and covenanted to execute a warranty deed therefor, on payment of the purchase-money, and the purchaser took and held actual possession and afterward paid the purchase-money, it was held that such purchaser's, or his grantee's, equitable title was a sufficient defense to an action of ejectment under the legal title, by the original owner, or any one holding under him with notice. *Talbert* v. *Singleton*, 42 Cal. 395. See, also, *Cavalli* v. *Allen*, 57 N. Y. (12 Sick.) 508. In an action brought by the assignee of a mortgage to foreclose the mortgage, the mortgagor has the right to set up and prove a mistake in the drawing of the instrument and have it reformed, although the mortgagee was not made a party to the action (*Andrews* v. *Gillespie*, 47 N. Y. [2 Sick.] 487),

the court holding that he was not a necessary party in order to a judgment of reformation. Id. And the mortgagor of personal property, or those standing in his shoes, can, when sued for damages for converting the property mortgaged, set up his equitable right to redeem. *Hinman* v. *Judson*, 13 Barb. 629. And, in general, whatever equities may exist between the parties, which should prevent a recovery by the plaintiff of his legal claim, may be set up as a defense to the action. See *Parker* v. *McCluer*, 5 Abb. (N. S.) 97; S. C., 36 How. 301; 3 Abb. Ct. App. 454; 3 Keyes, 318. In an action upon a policy of re-insurance, the recovery was defeated by the fact, set up in the defense, that the same person acted as agent for both the parties in procuring the policy to be issued, and that his agency for the plaintiff was unknown to the defendant at the time. *New York, etc., Ins. Co.* v. *Nat. Protection Ins. Co.*, 14 N. Y. (4 Kern.) 85. And see *Caulkins* v. *Hellman*, 14 Hun (N. Y.), 330. In an action of trespass, for entering and cutting standing timber, the defendant may interpose, as a defense, a right as the equitable owner of the timber. *Carpenter* v. *Ottley*, 2 Lans. (N. Y.) 451. The assignee of a lease brought an action for the rent, and it was held that the defendant was at liberty to show that the assignment to the plaintiff, by the original lessee, of his term, was made for the purpose of securing a debt; and that such debt had been fully paid at the time of the notice to him from the plaintiff. *Despard* v. *Walbridge*, 15 N. Y. (1 Smith) 374.

The authority to bring in additional parties, conferred by the New York Code, only applies to equitable actions. A defendant cannot convert a legal action into an equitable one by interposing an equitable defense. Such defense must stand and be tried upon its merits as a mere naked defense. Accordingly, where a defendant in an action of ejectment alleges that the deed under which the plaintiff's grantor claimed, was, in fact, a mortgage, and that the same had been paid and discharged, it was held that he was not entitled to an order requiring the plaintiff to bring in the executors of his deceased grantor as necessary parties to the action. *Webster* v. *Bond*, 9 Hun (N. Y.), 437.

Under the reformed codes of procedure generally, a defendant may not only avail himself of an *equitable* defense, whatever may be the nature of the action, but such defense may be joined with any other defenses, *legal* or *equitable*, which may possibly arise in the action. *Despard* v. *Walbridge*, 15 N. Y. (1 Smith) 374. See *Bosley* v. *Mattingly*, 14 B. Monr. (Ky.) 72; *Bennett* v. *Titherington*, 6 Bush (Ky.), 192.

§ 5. **Affirmative relief.** We have seen, *ante*, p. 672, § 1, that the doctrine held by the courts in some of the States is that, in order to entitle the defendant to the benefit of an equitable defense as a bar to a

legal cause of action, the facts relied upon must be such that he would be awarded an affirmative remedy if he elected to demand a judgment conferring it. See *Conger* v. *Parker*, 29 Ind. 380; *Kenyon* v. *Quinn*, 41 Cal. 325. In England, the court will not allow any plea or replication on equitable grounds where it does not appear that there is any ground for equitable relief. *Hunter* v. *Gibbons*, 1 Hurl. & N. 459. In *Conger* v. *Parker*, 29 Ind. 380, it is said that, when a mistake in a deed or other written instrument is relied on, the pleading should pray affirmative relief, that the instrument be reformed, so as to show the contract intended to have been embodied in it, and that, when so reformed, it might be allowed as a bar, or to so much thereof as it would bar. And in *Lombard* v. *Cowham*, 34 Wis. 486, 492, the court said, the defense, being an equitable one, to be available in an action of ejectment, must be set up in the answer, and be accompanied by a demand for such relief as the defendant supposes himself entitled to. A mere equitable *defense* is not sufficient; there must be a counter-claim also. And see *DuPont* v. *Davis*, 35 Wis. 634.

It seems, however, that in Missouri affirmative equitable relief can never be granted to the defendant upon his mere answer. And where, in an action to recover lands, the defendant set up as a defense his purchase of the premises under a contract with the plaintiff's deceased father, it was held that such answer, if true, was sufficient to defeat the plaintiff's recovery. But it was further held, that the defendant would not in consequence of such finding of the issue be entitled to a decree vesting the title in himself as against all the heirs; and that that portion of his answer praying for a decree of title in himself should be stricken out. *Harris* v. *Vinyard*, 42 Mo. 568. And see *State* v. *Meagher*, 44 id. 356.

In an early case under the New York Code, it was held by the court of appeals, in an action upon a covenant against incumbrances in a deed of lands, brought to recover damages for a breach thereof by means of an outstanding mortgage, that although the defendant might show, by way of equitable defense in bar, a mistake in the deed by which an exception of that very mortgage was omitted from the covenant, yet he could not have, in that action, and upon an answer setting up all these facts, the affirmative relief of reformation. *Haire* v. *Baker*, 5 N. Y. (1 Seld.) 357. But subsequent adjudications made by the same court, and the decisions of the courts in other States, would seem to establish the general rule, that affirmative relief may be granted to the defendant upon his answer in all cases where, from the nature of the subject-matter and from the relations of the parties, a specific remedy in his favor is possible according to the doctrines of equity juris-

prudence, and especially, if the demand alleged in the answer constitutes a valid counter-claim. See *Bartlett* v. *Judd*, 23 Barb. 262; S. C. affirmed, 21 N. Y. (7 Smith) 200; *Pitcher* v. *Hennessey*, 48 N. Y. (3 Sick.) 415; *ante*, pp. 672, 673, §§ 1, 2; *Klonne* v. *Bradstreet*, 7 Ohio St. 322; *Hammond* v. *Perry*, 38 Iowa, 217. It may be observed in this connection, that a counter-claim is a kind of equitable defense, which is permitted to be set up, when it arises out of the contract set forth in the complaint. It embraces both recoupment and set-off and it is intended to secure to a defendant all the relief which either an action at law, or a bill in equity, or a cross-suit, would have secured on the same state of facts. But it must be something which resists or modifies the plaintiff's action. *Leavenworth* v. *Packer*, 52 Barb. 132; *Messenger* v. *City of Buffalo*, 21 N. Y. (7 Smith) 196; *Boston Mills* v. *Eull*, 6 Abb. (N. S.) 319; S. C., 37 How. 299; 1 Sweeny, 359.

# CHAPTER XXII.

## ESTOPPEL.

### ARTICLE I.

#### OF ESTOPPEL IN GENERAL.

**Section 1. Definition and nature.** As defined by Coke, "an estoppel is where a man is concluded by his own act or acceptance to say the truth." Co. Litt. 352 *a*. And see *Water's Appeal*, 35 Penn. St. 523, 527. In fuller language, it is defined to be an *admission*, or something which the law treats as equivalent thereto, of a nature so high and conclusive that the party whom it affects is not permitted to aver against it, or offer evidence to controvert it. 2 Sm. Lead. Cas. 581, 582. The doctrine of estoppel debars the truth in the particular case, and for this reason is sometimes characterized as odious and not to be favored. See *Leicester* v. *Rehoboth*, 4 Mass. 180; *Owen* v. *Bartholomew*, 9 Pick. 520. On the other hand, it is to be observed, that it debars the truth only when its utterance would convict the party of a previous falsehood, or would be the denial of a previous representation on the faith of which other persons have dealt and pledged their credit, or expended their money. It is a doctrine therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence only when the party should not in conscience and honesty be allowed to speak. *Van Rensselaer* v. *Kearney*, 11 How. (U. S.) 297, 326. The conclusiveness of judgments which conduce so essentially to peace and repose have no other foundation. *Martin* v. *Ives*, 17 Serg. & R. (Penn.) 364.

Formerly, questions of regarding estoppel arose almost entirely in relation to transfers of real estate. But in more recent times, as will hereafter appear, the principle has come to be applied to all cases where one by words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief or to alter his own previous position. See *Freeman* v. *Cooke*, 2 Exch. 654; *Titus* v. *Morse*, 40 Me. 348; *Bocock* v. *Pavey*, 8 Ohio St. 270. The office of estoppels at law is like that of injunctions in equity, to preclude rights that cannot be asserted consistently with

good faith and justice, and prevent wrongs for which there might be no adequate remedy. *Van Rensselaer* v. *Kearney*, 11 How. (U. S.) 297; *Buckingham* v. *Hanna*, 2 Ohio St. 551; 2 Sm. Lead. Cas. (7th Am ed.) 672.

§ 2. **Ought to be certain.** An estoppel ought to be certain to every intent, and precise and clear. *Lajoye* v. *Primm*, 3 Mo. 529. Thus where a party claims to establish his right merely by an estoppel by deed, the estoppel must be made out by precise, clear and unequivocal language, not depending upon doubtful inference. *Rich* v. *Atwater*, 16 Conn. 418. See, also, *Hubbard* v. *Norton*, 10 id. 433; *Vanbibber* v. *Beine*, 6 W. Va. 168.

And if upon the face of a record any thing is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when offered as evidence. *Russell* v. *Place*, 94 U. S. (4 Otto) 606; *Chrisman* v. *Harman*, 29 Gratt. (Va.) 494.

§ 3. **Ought to be reciprocal or mutual.** The estoppel must likewise operate mutually between the parties. *Lewis* v. *Castleman*, 27 Tex. 421; *Bolling* v. *Mayor*, 3 Rand. (Va.) 563; *Longwell* v. *Bentley*, 3 Grant's (Penn.) Cas. 177; 23 Penn. St. 99; *Schuhman* v. *Garratt*, 16 Cal. 100. The rule is, that both parties must be bound, or neither is estopped. Id.; *Lansing* v. *Montgomery*, 2 Johns. 382. One who is not bound by, cannot take advantage of an estoppel. Id.

§ 4. **Who are bound by it.** As estoppels must be mutual, it follows that they are in general limited to parties and privies. *Deery* v. *Cray*, 5 Wall. 795; *Nutwell* v. *Tongue*, 22 Md. 419; *Griffin* v. *Richardson*, 11 Ired. (N. C.) L. 439; *Water's Appeal*, 35 Penn. St. 523. In other words, an estoppel can only be asserted or pleaded by one who was affected by the act which constitutes the estoppel. *Miles* v. *Miles*, 8 Watts & Serg. (Penn.) 135. Privies, or those who derive title from or through the parties, ordinarily stand in the same position as the parties, and will be bound by every estoppel that would have been binding on them. *Carver* v. *Jackson*, 4 Pet. 1; *Wark* v. *Willard*, 13 N. H. 389. So when the estoppel takes effect upon and passes an after-acquired title, third persons will be as much precluded from questioning its operation as the parties, although they may still be at liberty to show that the title is not valid, or did not come within the reach of the estoppel. 2 Sm. Lead. Cas. (7th Am. ed.) 684. And see *Van Rensselaer* v. *Kearney*, 11 How. (U. S.) 297, 325; *Gluckauf* v. *Reed*, 22 Cal. 468; *French* v. *Spencer*, 21 How. (U. S.) 228; *Gould* v. *Nest*, 32 Tex. 352. But see *Buffum* v. *Hutchinson*, 1 Allen, 58.

§ 5. **Who not so bound.** In general, there can be no estoppel where there is no privity of estate. *Langston* v. *M'Kinnie*, 2 Murph. (N.

C.) 67. A stranger is not therefore bound by, nor can he take advantage of an estoppel. *Massure* v. *Noble*, 11 Ill. 531; *Murray* v. *Sells*, 53 Ga. 257; *Sunderlin* v. *Struthers*, 47 Penn. St. 411; *Glidden* v. *Town of Unity*, 30 N. H. 104. And this rule applies equally whether the estoppel arises by deed, by record, or from matter *in pais*. *Simpson* v. *Pearson*, 31 Ind. 1.

The government of the United States is not ordinarily bound by an estoppel. *Johnson* v. *United States*, 5 Mas. (C. C.) 425. And the principle of the common law, that the sovereign cannot be estopped, has been applied to a State (*Taylor* v. *Shufford*, 4 Hawks [N. C.], 116), and it is held that the State is not bound by an estoppel, nor is a grantee from the State estopped to deny what the State, from whom he claims, is at liberty to assert. *Candler* v. *Lunsford*, 4 Dev. & Bat. (N. C.) L. 407. See *Commonwealth* v. *Andre*, 3 Pick. 224; *Commonwealth* v. *Pejepscut Proprietors*, 10 Mass. 155. But a State may be estopped by the acts of its legislature. *Enfield* v. *Permit*, 5 N. H. 280.

§ 6. **Not favored as a defense.** It has been said of estoppels that they are odious, and not to be favored as defenses. *Andrews* v. *Lyons*, 11 Allen, 349. And see *ante*, p. 679, § 1. So, since they operate to exclude the truth, they must be strictly construed. *Lounsbury* v. *Depew*, 28 Barb. 44. But the cases in which estoppels have been said to be odious, or not to be favored, should be understood as applying only when the technicality of the estoppel cannot be subordinated to its equity. See *Waters' Appeal*, 35 Penn. St. 523; *Bocock* v. *Pavey*, 8 Ohio St. 270; *State* v. *Pepper*, 31 Ind. 76

## ARTICLE II.

### ESTOPPEL IN PAIS, OR EQUITABLE ESTOPPEL.

**Section 1. In general.** An estoppel *in pais* or equitable estoppel occurs when a party to an action has by his act or declaration induced the other party to do some act or acts which otherwise would not have been done; or to omit to do some act or acts which he would have done, and by means of which he has been injured. *Reynolds* v. *Garner*, 66 Barb. 310; *Heath* v. *Derry Bank*, 44 N. H. 174; *Cummings* v. *Webster*, 43 Me. 192; *Brown* v. *Wheeler*, 17 Conn. 345; *Louks* v. *Kenniston*, 50 Vt. 116; *Chandler* v. *White*, 84 Ill. 435. The principle underlying such estoppels is, that it would be a fraud in a party to assert what his previous conduct and admissions have denied, when, on the faith of that denial, others have acted. *Simpson* v. *Pearson*, 31 Ind. 1; *Horn* v. *Cole*, 51 N. H. 287; 12 Am. Rep. 111; *Chapman* v. *O'Brien*, 2 Jones & Sp. (N. Y.) 524. The law enforces the rule of

good morals as a rule of policy, and precludes the party from repudiating his representations, or denying the truth of his admissions. *Douglass* v. *Scott*, 5 Ohio, 195.

For the application of the doctrine of estoppel *in pais* or equitable estoppel, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. *Brant* v. *Virginia Coal, etc., Co.*, 93 U. S. (3 Otto) 326. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up. *Hill* v. *Epley*, 31 Penn. St. 334; *Zuchtmann* v. *Roberts*, 109 Mass. 53; 12 Am. Rep. 663; *Henshaw* v. *Bissell*, 18 Wall. 271; *Dorlarque* v. *Cress*, 71 Ill. 380; *Chandler* v. *White*, 84 id. 435. And as thus understood and applied in modern times, there is nothing harsh or unjust in the law of estoppel. It can be used only to subserve the cause of justice and right. *Buckingham* v. *Hanna*, 2 Ohio St. 551. And see *Cairncross* v. *Lorimer*, 3 Macq. H. L. Cas. 829.

It has been said that the principles on which the doctrine of estoppels *in pais* is based are simply rules of evidence, by which, in consequence of certain matters having taken place, a party is precluded from proving certain facts, or relying on a certain claim or defense, which he otherwise would be entitled to prove or to rely on; and these rules are the same in actions at law, and suits in equity. *Bean* v. *Pettingill*, 7 Robt. (N. Y.) 7.

The elements which are now deemed necessary to be present in order to an estoppel *in pais* will be separately noticed in the five following sections.

§ 2. **Representation or concealment of material facts.** There must have been a representation or a concealment of material facts. And, in all ordinary cases, the representation or concealment must have reference to a fact or state of things *actually existing*, or *past and executed*, and not to a present intention or purpose concerning something in the future. *Musgrave* v. *Sherwood*, 54 How. (N. Y.) 338; *White* v. *Ashton*, 51 N. Y. (6 Sick.) 280; *Langdon* v. *Doud*, 10 Allen, 433. The reason on which the doctrine of estoppel rests is, that it would operate as a fraud if a party were allowed to aver and prove a fact to be contrary to that which he had previously stated to another for the purpose of inducing him to act and to alter his condition, to his prejudice, on the faith of such previous statement. Id. And see *ante*, pp. 679, 681, § 1. But the reason wholly fails when the representation relates only to a present intention or purpose of a party, because, being in its nature uncertain and liable to change, it could not properly form

a basis or inducement upon which a party could reasonably adopt any fixed and permanent course of action. *Langdon* v. *Doud*, 10 Allen, 433. See, also, *Jorden* v. *Money*, 5 H. L. Cas. 185; *Keating* v. *Orne*, 77 Penn. St. 89.

The estoppel may arise from passive conduct. Thus, if a person tacitly encourages an act to be done, or silently consents to it, he cannot afterward exercise his legal right in opposition to such consent. *Blackwood* v. *Jones*, 4 Jones' (N. C.) Eq. 54; *Hollingsworth* v. *Hancock*, 7 Fla. 338; *Morris Canal, etc., Co.* v. *Lewis*, 12 N. J. Eq. 323; *Gregg* v. *Wells*, 10 Ad. & El. 90; *Miranville* v. *Silverthorn*, 48 Penn. St. 149; *Chapman* v. *Chapman*, 59 id. 214. This is in accordance with the familiar principle in equity that, if a person maintains silence when in conscience he ought to speak, he shall be debarred from speaking when conscience requires him to be silent. *Niven* v. *Belknap*, 2 Johns. 573; *Hall* v. *Fisher*, 9 Barb. 17. And see *post*, p. 705, Art. 3, § 20.

The distinction between contract and estoppel *in pais* may be illustrated by a statement of the rule that, although a promise to forgive a debt, or to forbear its collection, either temporarily or for an indefinite period, unsupported by any consideration, is ineffectual as a defense, viewed merely as an *agreement*, yet, if the surety has been induced by such an assurance to neglect any of the means which might have been used for his indemnity, the promise may have that effect as an *estoppel* which it wants as a contract, and amount to a defense against any subsequent action brought by the creditor. *White* v. *Walker*, 31 Ill. 422; *Harris* v. *Brooks*, 21 Pick. 195.

§ 3. **Representation made with knowledge of the facts.** It has been said that, in all the cases where an estoppel has been held to exist, it will appear upon examination that there was some evidence tending to show that the party estopped had some *knowledge* of the rights, interests or intentions of the other party, or of his relations to the thing to which his declarations or acts related (*Piper* v. *Gilmore*, 49 Me. 149, 153; *Andrews* v. *Lyons*, 11 Allen, 349; *Whitaker* v. *Williams*, 20 Conn. 98); and that, as a general rule, estoppels *in pais* cannot apply, unless the party doing the act or making the admission knows at the time the truth of the matter about which he is acting or making admissions, or pretends that he knows the same, or has better means of knowing the same than the other party. *Clark* v. *Coolidge*, 8 Kans. 189. And see *Liverpool Wharf* v. *Prescott*, 7 Allen, 494; *Rutherford* v. *Tracy*, 48 Mo. 325; S. C., 8 Am. Rep. 104; *Smith* v. *McNamara*, 4 Lans. (N. Y.) 169; *Reed* v. *McCourt*, 41 N. Y. (2 Hand) 435. But it seems to be settled, that a party's ignorance of the truth of a representation will not prevent an estoppel, if his ignorance is the

result of gross negligence. *Sweezey* v. *Collins*, 40 Iowa, 540; *Calhoun* v. *Richardson*, 30 Conn. 210; *Slim* v. *Croucher*, 1 D. F. & J. 518. For instance, if one who is apparently a party to a bill of exchange, on being inquired of concerning the signature, pronounces it to be genuine, he cannot afterward set up, against a purchaser whom he has misled, forgery of his own name, although he may have accredited the bill ignorantly. *Preston* v. *Mann*, 25 Conn. 118. And see *Stone* v. *Great Western Oil Co.*, 41 Ill. 85 But negligence, in order to operate as an estoppel, must be the proximate cause of the loss. *Swan* v. *North British Co.*, 2 Hurl. & Colt. 175.

§ 4. **Ignorance of the opposite party as to the truth of the matter.** In order to make out an estoppel, it must not only appear that the representation was made with knowledge of the facts, but the party to whom it was made must have been ignorant of the truth of the matter, and also destitute of all convenient or ready means of acquiring such knowledge by the use of ordinary diligence. *Biddle Boggs* v. *Merced Mining Co.*, 14 Cal. 279; *Martin* v. *Zellerbach*, 38 id. 300; *Woods* v. *Wilson*, 37 Penn. St. 379, 384; *Hambleton* v. *Central Ohio R. R. Co.*, 44 Md. 551.

§ 5. **Intent that the opposite party should act on it.** There is a seeming conflict among the numerous decisions on the doctrine of estoppels *in pais*, whether any one will be estopped by a representation made, which turns out not to be true where there was no *intention* to influence the conduct of any one by it, and where it was not apparent that the representation would have that effect. In a recent, well-considered case, it is said that the decided weight of authority is that a party is not estopped by his acts or declarations from showing the truth, unless such acts or declarations were *intended* to influence the conduct of another, or he had reason to believe that they would have that effect. *Kuhl* v. *Mayor of Jersey City*, 23 N. J. Eq. 84. And see *Piper* v. *Gilmore*, 49 Me. 149; *Turner* v. *Coffin*, 12 Allen, 401; *Wilcox* v. *Howell*, 44 N. Y. (5 Hand) 398; *Freeman* v. *Cooke*, 2 Exch. 654; *Clarke* v. *Hart*, 6 H. L. Cas. 633; *In re Bahia, etc., Railway Co.*, L. R., 3 Q. B. 584. In a recent case in New York, the court held that it was not necessary to the estoppel that the party should intend *willfully* to mislead; but whatever may be the intent, if he make such a representation as a sensible man would take to be true, and believe that it was meant that he should act upon it, and he does so act, the party making the representation is precluded from contesting its truth. *Continental Bank* v. *Bank of Commonwealth*, 50 N. Y. (5 Sick.) 575. And see *Blair* v. *Wait*, 69 N. Y. (24 Sick.) 113; *Cornish* v. *Abington*, 4 Hurl. & N. 549.

§ 6. **Opposite party induced to act upon it.** Another of the elements of an estoppel *in pais* is, that the party setting up the estoppel should have relied on the statements made or acts done which are claimed to make an estoppel. And, unless this affirmatively appears, a case of estoppel will not be made out. *Malony* v. *Horan*, 12 Abb. (N. S.) 289; 49 N. Y. (4 Sick.) 111; 10 Am. Rep. 335; *Copeland* v. *Copeland*, 28 Me. 525; *Shaw* v. *Beebe*, 35 Vt. 205; *Diller* v. *Brubaker*, 52 Penn. St. 498; *Davidson* v. *Young*, 38 Ill. 145. In other words, no man can set up another's act or declaration as the ground of an estoppel, unless he has himself been misled or deceived by it. *Simpson* v. *Pearson*, 31 Ind. 1. See, also, *Holmes* v. *Crowell*, 73 No. Car. 613; *McKinzie* v. *Steele*, 18 Ohio St. 38; *Connihan* v. *Thompson*, 111 Mass. 270. A party is not estopped by his representations or acts, when the other party neither does nor omits to do any act in consequence thereof. *Wheelock* v. *Town of Hardwick*, 48 Vt. 19. It is not, however, necessary, that the party who claims the estoppel should have acted *affirmatively* upon it. It is enough if he shall have been induced to refrain from such action as lay in his power by which he might have retrieved his position and saved himself from loss. *Voorhees* v. *Olmstead*, 6 N. Y. Sup. Ct. (T. & C.) 172; S. C., 3 Hun, 744; S. C. affirmed, 66 N. Y. (21 Sick.) 113.

§ 7. **Who estopped.** See *ante*, p. 680, Art. 1, §§ 4 and 5. In the case of estoppel *in pais*, as in other branches of estoppel, only parties and their privies are bound by the representation. Id. And the fact that one has been guilty of a fraud in his dealings with one person, so that, as to this person, he is estopped, does not estop him as to another person who is not a privy in estate with the first. *Murray* v. *Sells*, 53 Ga. 257.

Corporations are bound by estoppels *in pais*, like natural persons. *Hale* v. *Union, etc., Ins. Co.*, 32 N. H. 295; *Selma, etc., R. R. Co.* v. *Tipton*, 5 Ala. 787; *Union Mining Co.* v. *Rocky Mountain Nat. Bank*, 2 Col. T. 248. One who executes an instrument as administrator of an estate is estopped to deny his representative capacity. *Du Val* v. *Marshall*, 30 Ark. 230. And it is held that the acts and admissions of one of several administrators, which amount to an estoppel against him, will work an estoppel against all. *Camp* v. *Moseley*, 2 Fla. 171. And see *Murray* v. *Blatchford*, 1 Wend. 583; *Wheeler* v. *Wheeler*, 9 Cow. 34. A wrong-doer is estopped to allege his own wrong, in order to enable him to plead the statute of limitations. *Brookman* v. *Metcalf*, 4 Robt. (N. Y.) 568; *Lamb* v. *Clark*, 5 Pick. 193.

One who holds himself out as a public officer, or acts as an officer *de*

*facto*, is estopped to deny that he is an officer *de jure*, even on a criminal prosecution for malfeasance in office. *State* v. *Stone*, 40 Iowa, 547; *Byrne* v. *State*, 50 Miss. 688. So, persons acting under the claim or pretense of being trustees, who have, in proceedings instituted by them, secured the fruits of the services of one employed by them, are estopped from shielding themselves against liability for payment for such services out of such fruits, on the ground that their acts were unlawful and void. *Randall* v. *Dusenbury*, 7 Jones & Sp. (N. Y.) 174; S. C. affirmed, 63 N Y. (18 Sick.) 645.

Where an individual held himself out to the plaintiffs and the public as a partner, though in fact he was not, and the plaintiffs had reason to believe and did believe he was a member of the firm, and trusted the firm on the strength of his representations, it was held, that such person was estopped from denying that he was a partner. *Vibbard* v. *Roderick*, 51 Barb. 616.

So, where a party by his acts or words causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous condition, he, and also a person for whom he is acting as *agent*, will be precluded from averring any thing to the contrary against the party so altering his condition. *Chouteau* v. *Goddin*, 39 Mo. 229.

§ 8. **Who not estopped.** Parties under disability, as infants and married women, are not estopped unless their conduct has been intentional. See *Rogers* v. *Higgins*, 48 Ill. 211; *Oglesby Coal Co.* v. *Pasco*, 79 Ill. 164; *Miles* v. *Lingerman*, 24 Ind. 385; *Baines* v. *Burbridge*, 15 La. Ann. 628. Indeed, it is said that no case has gone the length of holding a party estopped by any thing he has said or done while he was under age. *Brown* v. *McCune*, 5 Sandf. (N. Y.) 224. See, also, *Lowell* v. *Daniels*, 2 Gray, 161; *Lackman* v. *Wood*, 25 Cal. 147. And it is held that an infant *feme covert* can recover her personal property sold in her presence by her husband, with her knowledge, and without objection on her part, or any notification to the buyer at the time that she was the owner of the property, although the rights of mortgagees from the buyer have supervened. *Upshaw* v. *Gibson*, 53 Miss. 341. And inasmuch as an infant is not bound by an estoppel *in pais*, he cannot claim one against an adult. Such an estoppel would lack mutuality. *Montgomery* v. *Gordon*, 51 Ala. 377. But a parol promise by a father to convey to his son a piece of land, if the son would erect a house thereon, having been acted upon, it was held to estop the father from asserting ownership as against the son. *Campbell* v. *Mayes*, 38 Iowa, 9.

In cases of fraud, unmixed with contract, whether by concealment or active conduct, it would seem to be pretty well settled, that a married woman may estop herself to deny the truth of her representation. *Connolly* v. *Branstler*, 3 Bush (Ky.), 702; *Schwartz* v. *Saunders*, 46 Ill. 18; *In re Lush*, L. R., 4 Ch. App. 591; *Vaughan* v. *Vanderstegen*, 2 Drew. 363. But see *Bemis* v. *Call*, 10 Allen, 512. So, an infant is undoubtedly responsible in damages for his torts and frauds. Thus, if he were to falsely allege himself to be of age, for the purpose of inducing another person to purchase and take a deed of his lands, he would be liable to respond in damages for any injury which might result to the purchaser in consequence of the deceit. *Schnell* v. *Chicago*, 38 Ill. 382. See, also, *Eckstein* v. *Frank*, 1 Daly (N. Y.), 334; *Norris* v. *Wait*, 2 Rich. (S. C.) 148. And the authorities are numerous which hold that, if an infant of years of discretion, having a right to an estate, permit or encourage a purchaser to buy it of another, the purchaser will hold it against the infant. See *Overton* v. *Banister*, 3 Hare, 503; *Esron* v. *Nicholas*, 1 DeG. & Sm. 118; *Whittington* v. *Wright*, 9 Ga. 23; *Hall* v. *Timmons*, 2 Rich. (S. C.) Eq. 120; Bigel. on Estop. 492. But it may be regarded as settled, that an infant can only be estopped, if ever, in the case of a pure tort. Id. Neither the conduct of an infant's mother in inducing him to enter into a contract, nor the act of her brother who drew the deed as her agent, can estop the infant from avoiding the contract. *Clark* v. *Goddard*, 39 Ala. 164. And the submission by the mother to arbitrators, of matters concerning an estate in which she and her minor children have a common interest, will not estop such minors from asserting their claim to the estate. *Snow* v. *Walker*, 42 Tex. 154.

But an acceptance by the heir or ward, after attaining majority, of the purchase-money of land sold under a void decree, is held to be a confirmation of the sale in the sense and to the extent of working an estoppel in equity against an assertion of the legal title. *Handy* v. *Noonan*, 51 Miss. 166. And see *Padfield* v. *Pierce*, 72 Ill. 500.

The estoppel which the courts apply to prevent principals, whether natural persons or business corporations, from denying the authority of their general agents while acting within the scope of their apparent powers, has no application to a public officer professing to discharge official functions. *Miller* v. *Mayor of New York*, 5 N. Y. Sup. Ct. (T. & C.) 219; S. C., 3 Hun, 35. Nor has the doctrine of estoppel any application to the question whether a law has been constitutionally passed. Thus, a municipal corporation which has issued bonds, purporting to be issued according to a State law, is not estopped from proving that the law was never constitutionally passed, by the facts that

it appears duly published among the State laws, is recited in the bonds, and the corporation has paid one installment of interest. *Town of South Ottawa* v. *Perkins*, 94 U. S. (4 Otto) 260; *Boyd* v. *Alabama*, id. 645.

Nothing less than legislative enactment or resolution can estop the State from asserting her right to property. *Alexander* v. *State*, 56 Ga. 478. And see *ante*, p. 680, Art. 1, § 5.

Many of the cases apply the doctrine of estoppel indiscriminately to both real and personal estate. See *Bigelow* v. *Foss*, 59 Me. 162; *Brown* v. *Bowen*, 30 N. Y. (3 Tiff.) 519; *Brown* v. *Wheeler*, 17 Conn. 345; *McCune* v. *McMichael*, 29 Ga. 312; *Beaupland* v. *McKeen*, 28 Penn. St. 124; *Barham* v. *Turbeville*, 1 Swan (Tenn.), 437; *Gill* v. *Denton*, 71 N. C. 341; 17 Am. Rep. 8; *Pool* v. *Lewis*, 41 Ga. 162; *Stevens* v. *Dennett*, 51 N. H. 324. But in a recent case in Michigan, in which the authorities are fully examined, the court lays down the doctrine that, while it is a recognized ground of equitable relief to compel the owner of lands to surrender them up to one who, by reliance upon such owner's fraudulent conduct, has been misled into taking action which gives him a superior equity, yet, at law, the legal title must prevail, and under the statute of frauds, it is not permissible that an estoppel, resting in parol, should work a transfer of the legal title to lands. *Hayes* v. *Livingston*, 34 Mich. 384; S. C., 22 Am. Rep. 533. See, also, *Gimon* v. *Davis*, 36 Ala. 589.

§ 9. **General effect of an estoppel.** Estoppels operate not only on present interests, but on rights subsequently acquired. *Bitting's Appeal*, 17 Penn. St. 211. But they operate only between parties and privies, and the party who pleads an estoppel must be one who was adversely affected by the act which constitutes the estoppel. *Cuttle* v. *Brockway*, 32 Penn. St. 45; *Wood* v. *Pennell*, 51 Me. 52. A party will not be estopped by a declaration to a stranger which has not been communicated to the party setting up the estoppel, in a way to influence his conduct. *Pennell* v. *Hinman*, 7 Barb. 644.

The doctrine of estoppel *in pais*, or equitable estoppel, is a defense available at law, as well as in equity. *Dickerson* v. *Board of Commissioners*, 6 Ind. 128. But an estoppel *in pais* can only be set up as a means to prevent injustice (*Thomas* v. *Bowman*, 29 Ill. 426); and the rule of estoppel *in pais* will not be extended in order to accomplish a fraudulent object. *Pennell* v. *Hinman*, 7 Barb. 644. See *Sprigg* v. *Bank of Mount Pleasant*, 1 McLean (C. C.), 384.

A party cannot be allowed to go behind an estoppel and insist upon a validity of the claim on which the estoppel operates. *Pool* v. *Harrison*, 18 Ala. 514.

## ARTICLE III.

### PARTICULAR INSTANCES AS TO ESTOPPELS.

**Section 1. In general.** In the following sections, particular instances as to the operation of estoppels will be given, in illustration of the general principles set forth in the two preceding articles.

§ 2. **What acts will estop.** It is a well-established general principle that, where one, by his *words* or *actions*, *intentionally* causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief, so as injuriously to affect him, he is precluded from averring a different state of things as existing at the time. *Arnold* v. *Cornman*, 50 Penn. St. 361; *Richardson* v. *Chickering*, 41 N. H. 380; *Martin* v. *Righter*, 10 N. J. Eq. 510; *Cowles* v. *Bacon*, 21 Conn. 451; *Cairncross* v. *Larimer*, 3 Macq. H. L. Cas. 829; *ante*, p. 682, Art. 2, § 2. And it has even been held that if any person, by actual expressions, or by a course of action, so conducts himself that another may reasonably infer the existence of an agreement or a license, and acts upon such inference, whether the former *intends that he should do so or not*, the party using that language, or who has so conducted himself, cannot afterward gainsay the reasonable inference to be drawn from his words or conduct. *Cornish* v. *Abington*, 4 Hurl. & N. 549. See *ante*, p. 684, Art. 2, § 5.

One who assists at a sale, and recommends the title as being good in the vendor, is estopped to set up against the purchaser a secret equitable title in himself. *Trowbridge* v. *Matthews*, 28 Wis. 656; *Winchell* v. *Edwards*, 57 Ill. 41; *Miller* v. *Springer*, 70 Penn. St. 269; *Dean* v. *Martin*, 24 La. Ann. 103. And a party who, being himself the owner of property, permits it to be seized in execution for the debt of another, will be estopped from denying the title of the defendant in the execution. *Amonett* v. *Young*, 14 id. 175; *Moore* v. *Bowman*, 47 N. H. 494. See, also, *Wilber* v. *Goodrich*, 34 Mich. 84.

Where a deed is executed on Sunday, but by the procurement of the grantor is dated as of the preceding day, he cannot assert the invalidity of the deed against a subsequent *bona fide* purchaser. *Love* v. *Wells*, 25 Ind. 503. So, one who makes and puts in circulation a negotiable note bearing date on a secular day is estopped, as against an innocent holder, from showing that it was executed on Sunday. *Knox* v. *Clifford*, 38 Wis. 651; 20 Am. Rep. 28.

If the owner of an estate, intentionally or by gross negligence, leads the public to believe that he has dedicated the premises to public use, he will be estopped from contradicting the dedication, to the preju-

dice of those whom he may have misled (*Wilder* v. *St. Paul*, 12 Minn. 192; *City of Cincinnati* v. *White*, 6 Pet. [U. S.] 431); and if a person having the equitable title dedicates land to the use of the public, and afterward acquires the legal title, he will be estopped from denying the dedication. *Mankato* v. *Willard*, 13 Minn. 13.

Where parties, or those under whom they claim, agreed upon a certain line between their tracts, and one of the parties acted upon that agreement and built his fence there, with the knowledge and consent of the other, it was held, that the former could not afterward repudiate that agreement and claim a different line, whatever may have been his legal rights independently thereof. *Clark* v. *Hulsey*, 54 Ga. 608. See, also, *Rutherford* v. *Tracy*, 48 Mo. 325; 8 Am. Rep. 104; *Stanwood* v. *McLellan*, 48 Me. 275; *Hoxey* v. *Clay*, 20 Tex. 582. It is however held that, in order to conclude the owner of land from denying his own acts, etc., in regard to an erroneous boundary line which have influenced others, they must be *willful* — that is, with knowledge of his rights, or an intention to deceive. *McAfferty* v. *Conover*, 7 Ohio St. 99.

As a general rule, where one man encourages another to settle on land and expend his money in improving it, he who offers the inducement shall not afterward allege any thing against the settler's title (*McKelvy* v. *Trubey*, 4 Watts & Serg. [Penn.] 323); but it is otherwise, when the settler knows of the dispute of title. Id.; *Beaupland* v. *McKeen*, 28 Penn. St. 124.

One who, knowing that he himself has the title to a certain tract of land, participates in inducing another to purchase it from a third person, who has no title, will not be allowed afterward to assert his title for the purpose of defeating that of such purchaser. *Sherrill* v. *Sherrill*, 73 No. Car. 8.

The purchaser at a wrongful sale on execution is estopped from setting up, when sued for the conversion, that he acted merely as agent in the purchase. *Baltes* v. *Ripp*, 1 Abb. Ct. App. (N. Y.) 78; S. C., 3 Keyes, 210. Certain persons having transacted business for several years as a corporation, a member thereof is estopped to deny its validity on the ground that the first meeting was not legally called (*Chester Glass Co.* v. *Dewey*, 16 Mass. 94); one assigning dower, by parol, to a widow is estopped to say that the land was not subject to dower (*Shattuck* v. *Gragg*, 23 Pick. 88); an administrator, selling more land than is necessary for the payment of debts and legacies, is estopped to deny the validity of the sales in settling his accounts (*Jennison* v. *Hapgood*, 10 id. 77. See, also, *Thomas* v. *Brooks*, 6 Tex. 369); and a person who has taken possession of property, as trustee, will not be

permitted to deny the right of the *cestui que trust.* *Anderson* v. *Smoot*, Spears' (S. C.) Ch. 312. So, a party, having waived a constitutional provision, cannot subsequently ask for its protection. *Lee* v. *Tillotson*, 24 Wend. 337.

§ 3. **What acts will not estop.** The doctrine of estoppel *in pais* does not extend so far as to enable a person or corporation to do in effect what is forbidden by law, or what they are otherwise incapable of doing. A party to a contract with a foreign corporation, made in violation of a State statute, is not, therefore, estopped to show its illegality for the purpose of preventing a recovery upon it. *In re Comstock*, 3 Sawyer, 218.

A stranger, who performs acts in regard to land which, if done by the owner, would amount to a dedication of it to public uses, is not thereby estopped, after acquiring title to such land, from showing that the land has never been so dedicated. *Bushnell* v. *Scott*, 21 Wis. 451. So, an owner of land, who points out his boundary to a person about to purchase adjoining land, is not thereby estopped from claiming beyond such boundary when his representations were not acted upon by the purchaser. *Russell* v. *Maloney*, 39 Vt. 579. So, if one, having the legal title to land, induces another to purchase it under execution against him, he is not thereby estopped, in a court of law, from showing that the sale was void, and passed nothing to the purchaser. *Smith* v. *Mundy*, 18 Ala. 182. And a public sale of lands does not estop persons who were present at the sale, made bids, and received the benefit of the sale, from bringing ejectment against a purchaser to recover the lands, when no title was ever made in writing to the purchaser. To hold otherwise would be to violate the statute of frauds, by allowing land to be conveyed without writing. *Roe* v. *Doe*, 31 Ga. 544. See, also, *Washabaugh* v. *Entriken*, 36 Penn. St. 513; *ante*, p. 686, Art. 2, § 8.

Mere non-action of the officers of a municipal corporation to assert a right will not work an estoppel. There must be some act done, influencing the act of another, which renders it inequitable to permit the corporation to stultify itself. *Supervisors of Logan Co.* v. *Lincoln*, 81 Ill. 156. And the subsequent recognition by a municipal corporation of acts done in the exercise of a prohibited power will not estop it to afterward deny the validity of the acts. *McPherson* v. *Foster*, 43 Iowa, 48; S. C., 22 Am. Rep. 215. Thus, in the absence of authority in a corporation to contract a debt, which was attempted under an unconstitutional legislative enactment, the payment of interest by the corporation was held to work no estoppel against setting up the unconstitutionality of the legislation, and the invalidity of the bonds

issued thereunder. *Loan Association* v. *Topeka*, 20 Wall. 655. See *Pendleton County* v. *Amy*, 13 id. 297. So, the assessment of a tax, without enforcing its collection, will not estop a county from setting up the claim that the land included in the grant was its own property at the time of the levy. *Page Co.* v. *Burlington, etc., R. R. Co.*, 40 Iowa, 520.

The surrender of an officer pursuant to an agreement to abide by an election, was held not to estop the person from setting up a prior right to the office after the election was adjudged void. *Turnipseed* v. *Hudson*, 50 Miss. 429; S. C., 19 Am. Rep. 15.

So, it is held that an execution plaintiff, bidding off the land and receiving the proceeds of the sale, is not thereby estopped from showing in a subsequent proceeding that the land belonged to another than the defendant in his execution. *Wade* v. *Saunders*, 70 No. Car. 270.

And the fact that a creditor has purchased from an assignee of an insolvent debtor a portion of the property assigned for the benefit of creditors, does not estop him from questioning the validity of the assignment. *Haydock* v. *Coope*, 53 N. Y. (8 Sick.) 68.

§ 4. **What admissions will estop.** A party will, in general, be estopped from denying the truth of his own admissions, which were intended to, and did influence the conduct of another, when such denial will operate to the injury of the latter. *McCabe* v. *Raney*, 32 Ind. 309; *Ridgway* v. *Morrison*, 28 id. 201; *Fitts* v. *Brown*, 20 N. H. 393; *Martin* v. *Zellerbach*, 38 Cal. 300; *McClellan* v. *Kennedy*, 8 Md. 230. And admissions which would otherwise operate as an estoppel, if acted upon, are not rendered inoperative because made on Sunday, no contract being then completed. *Riley* v. *Butler*, 36 Ind. 51. Even in the case of a married woman, if she voluntarily make admissions and representations in respect to her rights of property, which deceive others and induce them to give credit to her husband, on the faith of the property, she will be precluded from asserting her claim against the rights of those who have trusted in and acted upon her admissions and representations. *Cravens* v. *Booth*, 8 Tex. 243. See, also, *Ryan* v. *Maxey*, 43 id. 192; *Fitzgerald* v. *Turner*, id. 79; *ante*, p. 685, Art. 2, § 7.

The admissions of an owner of land, made while he was owner, bind those who claim under him. *Wood* v. *McGuire*, 15 Ga. 202. If a purchaser of real estate has admitted that he had the means of knowing that there was an adverse claim before he bought, he is estopped to deny that he had notice, and cannot be considered a purchaser in good faith and without notice. *Speck* v. *Riggin*, 40 Mo. 405. And see

*Libbey* v. *Pierce*, 47 N. H. 309. A verbal admission, by an administrator, of a claim against the estate, and that it will be paid, whereby a third person is induced to take the claim, estops the administrator from contesting the claim in the hands of such person. *Swenson* v. *Walker*, 3 Tex. 93. See *Johnson* v. *Brown*, 25 Tex. Supp. 120.

And if a party admits himself to be a subscriber to the stock of a railroad company, and on the faith of such admission others have acted for his benefit, he will be estopped from subsequently denying that he did in fact subscribe. *Graff* v. *Pittsburg, etc., R. R. Co.*, 31 Penn. St. 489.

§ 5. **What admissions will not estop.** An admission, in order to conclude a party from afterward asserting a right, must be plainly inconsistent with that right, and must have been acted on by the other party; if it is susceptible of two constructions, one of which is consistent with that right, it forms no estoppel. *Ware* v. *Cowles*, 24 Ala. 446; *Tainter* v. *Winter*, 53 Me. 348; *Fredenburg* v. *Lyon Lake M. E. Church*, 37 Mich. 476. And see *Grooms* v. *Rust*, 27 Tex. 231; *Young* v. *Foute*, 43 Ill. 33; *Hunley* v. *Hunley*, 15 Ala. 91; *Catlin* v. *Grote*, 4 E. D. Smith (N. Y.), 296.

No party is estopped by an admission made in ignorance of his rights, induced by an innocent mistake of material facts (*Thrall* v. *Lathrop*, 30 Vt. 307. And see *Royston* v. *Howie*, 15 Ala. 309; *Smith* v. *Hutchinson*, 61 Mo. 83); nor by an admission or assertion of a conclusion of law upon undisputed facts. *Brewster* v. *Striker*, 2 N. Y. (2 Comst.) 19. An offer to pay a mortgage, not accepted, is no estoppel to a subsequent denial of the amount due, or of the right of the holder to enforce payment thereof. *Jackson* v. *Campbell*, 5 Wend. 572. So, a party to an instrument for the payment of money is not, by his mere refusal to pay it, based solely on the ground of inability, to a person then in possession thereof, estopped from showing that it was not legally binding upon him. *Van Ness* v. *Bush*, 14 Abb. Pr. (N. Y.) 33; S. C., 22 How. 481.

A tenant in common is not estopped by the admission of a co-tenancy from setting up a better title in himself and others. *Washington* v. *Conrad*, 2 Humph. (Tenn.) 562. Verbal admissions made by a party respecting property which is the subject of a suit, tending to show a sale to the other party, cannot estop him from showing the true nature of the right. *Isaac* v. *Williams*, 3 Gill (Md.), 278. So, the parol admissions of a married woman of a sale of her separate property are not admissible for the purpose of divesting her of a title, nor will she be precluded by such admissions. *Baily* v. *Trammell*, 27 Tex. 317. And it has been held that verbal admissions, or mere presence at a survey,

cannot operate as an estoppel *in pais*. *Valle* v. *Clemens*, 18 Mo. 486. And a proposal to purchase the claim of a party to land, unaccepted, does not operate as an admission of the validity of the claim, which can defeat an action to establish a paramount title. *Ernst* v. *Montigudo*, 21 La. Ann. 169.

§ 6. **What declarations will estop.** Declarations, to create an estoppel, must be made by a party whose duty it is to know and state the truth, and must be relied on by one who has no other means of information, or is justified in relying upon such declarations. *Hambleton* v. *Central Ohio R. R. Co.*, 44 Md. 551. And see *Eaton* v. *Winnie*, 20 Mich. 156; 4 Am. Rep. 377; *White* v. *Langdon*, 30 Vt. 599; *Forsyth* v. *Day*, 46 Me. 176; *Roe* v. *Jerome*, 18 Conn. 138. A party is, in general, estopped to deny what he declared in bad faith, to the disadvantage of his adversary. *Bowen* v. *Buck*, 28 Vt. 308; *Garrison* v. *Garrison*, 29 N. J. L. 153; *Crockett* v. *Lashbrook*, 5 T. B. Monr. (Ky.) 530. And where an express declaration to a third party is not confidential but general, and this is afterward acted upon by others, the party making the declaration should be estopped (*Mitchell* v. *Reed*, 9 Cal. 204); that is, the particular intention with which the declaration was made is held not to be material, except, perhaps, where the communication is confidential. It is the fact that the declaration has been acted upon by others that constitutes the liability to them. Id.; *McGee* v. *Stone*, id. 606. And see *Horn* v. *Cole*, 51 N. H. 287; S. C., 12 Am. Rep. 111; *ante*, p. 685, Art. 2, § 6. But see *contra*, *Kinney* v. *Whiton*, 44 Conn. 262. A party who obtains a conveyance of land in his own name, paying his own money for it, but professing to act as agent for another, will be estopped from denying his agency. *Reigard* v. *McNeil*, 38 Ill. 400. And see *Reed* v. *Vancleve*, 27 N. J. L. 352. So, one who has voluntarily induced another to believe that he was not ignorant of a certain matter is estopped, after the other has been betrayed by his false representation, from pleading a want of the knowledge which he assumed to possess. *Preston* v. *Mann*, 25 Conn. 118.

Where a husband is present at a public sale of chattels, in which his wife has an interest as distributee of an estate, and induces another to purchase, by declaring the title under which the property is sold to be good, he estops both himself and his wife, if she survives him, from afterward disputing the title of the purchaser. *McCoa* v. *Woolf*, 42 Ala. 389. So, where an administrator sells land, representing it to be free from incumbrances, and the widow being present assents to this statement, and states that it will be sold free of her claim of dower, she is estopped from subsequently claiming dower in the land sold. *Sweaney* v. *Mallory*, 62 Mo. 485.

Where an agent or partner makes a representation of a fact outside the terms of his power, and which, from its nature, rests peculiarly within his knowledge, upon the faith of which another party acts, the principal or firm is precluded from controverting the fact so alleged. *Griswold* v. *Haven*, 25 N. Y. (11 Smith) 595. And a person in possession of land was held to be estopped to dispute the title of a grantee to whom, at the time of the conveyance, he had represented himself to be merely the agent of the grantor. *Smith* v. *McNeal*, 68 Penn. St. 164.

If the maker of a promissory note tells one seeking to trade for it, and desirous to know if he has any defense against it, that it is "all right," he is estopped from setting up a defense to the note, if the facts upon which the defense is rested existed at the time of making such declaration. *Brooks* v. *Martin*, 43 Ala. 360; *McCabe* v. *Raney*, 32 Ind. 309. So, declaring a note to be "good," to one about to purchase it, or standing by in silence when it is transferred for consideration, is an estoppel *in pais* against a debtor. *Petrie* v. *Feeter*, 21 Wend. 172. And see *Smith* v. *Stone*, 17 B. Monr. (Ky.) 168; *Vanderpool* v. *Brake*, 28 Ind. 130; *Cloud* v. *Whiting*, 38 Ala. 57; *Crout* v. *De Wolf*, 1 R. I. 393. And if the proper officers of a bank negotiate an accommodation bill, in which it has no interest, to another bank, representing it to belong to their bank, upon the faith of which representation, and in the usual course of business, the latter discounts it, the former is estopped to say that it was indorsed without authority. *Bank of Genesee* v. *Patchin Bank*, 13 N. Y. (3 Kern.) 309. So, if the owner of a note allows another person to hold himself out as the owner of the note, and as such to deal with it, concealing the fact of his agency, he will be bound by the declarations of that person, and estopped to deny his right to make them. *Reed* v. *Vancleve*, 27 N. J. Law, 352. See, also, *Ferguson* v. *Hamilton*, 35 Barb. 427; *Ahern* v. *Goodspeed*, 9 Hun (N. Y.), 263.

If a mortgagor makes a false statement orally or in writing, to influence the purchase of the security, he is estopped from taking advantage of it as against an innocent purchaser. *Eitel* v. *Bracken*, 6 Jones & Sp. 7. Thus, a mortgagor who induces a person to purchase the mortgage by representations, that it is valid in its inception, or free from fraud, or that a certain amount is due upon it, is estopped from setting up any of these defenses. *Marr* v. *Howland*, 20 Wis. 282; *Lesley* v. *Johnson*, 41 Barb. 359; *Real Estate Trust Co.* v. *Rader*, 53 How. (N. Y.) 231.

Where a husband had induced his wife to marry him by representations that, in consideration of the marriage, his father would convey

certain lands to her, which was done, it was held, that he was estopped from setting up a title to the lands in himself, to override her title under the father's deed. *Chapman* v. *Chapman*, 59 Penn. St. 214.

The assertion of a particular construction and effect of a written instrument of an obscure or doubtful character is equally good as an estoppel, if believed, relied upon and acted upon, as is a disclaimer of title, to the person about to purchase. *Mattoon* v. *Young*, 5 N. Y. Sup. Ct. (T. & C.) 109; S. C., 2 Hun, 559.

§ 7. **What declarations will not estop.** A party cannot rely upon an estoppel from acts and representations upon which he was not induced to act otherwise than he would (*Helser* v. *McGrath*, 52 Penn. St. 531; *Austin* v. *Thomson*, 45 N. H. 113; *Campbell* v. *Smith*, 9 Wis. 305), nor can he upon information given which is no more than the public records disclose. *St. Joseph Manuf. Co.* v. *Daggett*, 84 Ill. 556. So, although admissions and declarations *in pais* may be strong evidence against the party making them, yet they will operate as an estoppel in favor only of those whose conduct, it may be fairly supposed, they were intended to influence. Strangers, casually hearing of such declarations, cannot, by acting on them, preclude the party from showing the truth. *Morgan* v. *Spangler*, 14 Ohio St. 102. See, also, *Taylor* v. *Ely*, 25 Conn. 250; *Danforth* v. *Adams*, 29 id. 107. And a naked declaration of an intention, made to one giving no reason for the inquiry, will not prevent the assertion of a right contrary to such intention. *Keating* v. *Orne*, 77 Penn. St. 89.

A promise to a body or organization, professing to be a corporation, but unable by law to have a legal existence as such, does not estop the promisor from setting up these facts. *Gillespie* v. *Fort Wayne, etc., R. R. Co.*, 17 Ind. 243. So it is held that one who is simply the agent of a firm cannot, by his representations, estop a particular individual from denying that he is a member of the firm. *Plumer* v. *Lord*, 9 Allen, 455. Nor is a principal estopped from asserting his title to property by merely intrusting the possession or control thereof to an agent, so far as is necessary for the transaction of the business of the agency. False declarations thereon, made by the agent, will not bind the principal, unless by his silence or acquiescence therein other persons have been misled thereby. *Greene* v. *Dockendorf*, 13 Minn. 70. See *ante*, Art. 2, pp. 685, 686, §§ 7, 8.

It is considered that every person is acquainted with the law, both civil and criminal, and no one can, therefore, complain of the misrepresentations of another respecting it. *Platt* v. *Scott*, 6 Blackf. (Ind.) 389.

§ 8. **What agreements will estop.** An executed agreement to

receive less than the amount of the debt due, by actual payment of the money agreed upon, can be pleaded as an accord and satisfaction, and will estop the party so receiving the money from asserting his claim to the balance. *Tyler Cotton Press Co.* v. *Chevelier*, 56 Ga. 494.

The settlement of an existing controversy being a good consideration for a contract, a party having a good defense to the payment of his obligation may release it upon an agreement of compromise. And if he do so, he will be thereby estopped from setting it up as a defense afterward. *Chamberlain* v. *M'Clurg*, 8 Watts & Serg. (Penn.) 31. And see *Washburn* v. *Washburn*, 4 Ired. (N. C.) Eq. 306. So where an agreement has been entered into by the parties to a suit, that all the claims in dispute shall be bound by the decision upon one of them, the court will not relieve in opposition to such agreement, though not in writing. *Henry* v. *Archer*, 1 Bailey's (S. C.) Ch. 535.

If the maker of a negotiable note, then overdue, having knowledge that it was in the hands of an indorsee for a valuable consideration, agrees to pay it, he cannot introduce claims in set-off arising after that time. *Lewis* v. *Hodgdon*, 17 Me. 267. And where the maker of a note requests one to purchase it, and after the purchase promises to pay the purchaser its contents, he cannot afterward set up against him an original want of consideration. *Bliss* v. *Rollins*, 6 Vt. 529.

One having made a contract with a company, in its corporate name, thereby admits that it is duly constituted a body politic and corporate at the time, and is estopped from setting up for defense by way of demurrer or otherwise, the non-allegation of these facts by the company in suit on the contract. *Nat. Ins. Co.* v. *Bowman*, 60 Mo. 252; *Worcester Medical Institution* v. *Harding*, 11 Cush. 285. See, also, *Newbury Petroleum Co.* v. *Weare*, 27 Ohio St. 343. In other words, he is estopped from denying the legal existence of such corporation (Id.; *Ohio, etc., R. R. Co.* v. *McPherson*, 35 Mo. 13), as, if one give a note to a corporation, he will not be permitted to deny that there is such a corporation. *Nashua Fire Ins. Co.* v. *Moore*, 55 N. H. 48; *Bank of Galliopolis* v. *Trimble*, 6 B. Monr. (Ky.) 599.

After a written contract for the erection of a building had been made, it was ascertained by the parties that certain work would be necessary, which, at the time of making the contract, was not anticipated; and the question which arose between them, as to who was to bear the expense of it, was settled by the employer agreeing to pay the contractors a specified sum for doing it, and, relying on this promise, they did it. And it was held that the employer was not afterward at liberty to insist that the written contract required them to do it at their

own expense. *Stewart* v. *Keteltas*, 9 Bosw. (N. Y.) 261; S. C. affirmed, 36 N. Y. (9 Tiff.) 388.

§ 9. **What agreements will not estop.** An agreement, void because fraudulent, as regards the government or public, cannot work an estoppel against a title acquired by either party thereto. *Harkness* v. *Underhill*, 1 Black (U. S.), 316. And no estoppel in relation to real estate is, in general, created by verbal contracts or admissions. *Gerrish* v. *Proprietors of Union Wharf*, 26 Me. 384.

§ 10. **What written contracts will estop.** A person who voluntarily signs, as maker, a negotiable promissory note, supposing he is binding himself to some other contract, and relying on the representations of the payee as to the contents of the paper, without examining it sufficiently to ascertain the fact for himself, is estopped by his own negligence from setting up the invalidity of the note against a *bona fide* holder thereof. *Kellogg* v. *Curtis*, 65 Me. 59; *Chapman* v. *Rose*, 56 N. Y. (11 Sick.) 137; S. C., 15 Am. Rep. 401. And see *Abbott* v. *Rose*, 62 Me. 194; S. C., 16 Am. Rep. 427; *Nebeker* v. *Cutsinger*, 48 Ind. 436; *Mosher* v. *Carpenter*, 13 Hun (N. Y.), 602; *Shirts* v. *Overjohn*, 60 Mo. 305; *Hunter* v. *Bryden*, 21 Ill. 591. And in general, if one signs a written contract without acquainting himself with its contents, he is estopped by his own negligence to ask relief from his obligation, if his signature be procured without fraud or artifice. *McCormack* v. *Molburg*, 43 Iowa, 561; *Hunter* v. *Miller*, 6 B. Monr. (Ky.) 612; *Rogers* v. *Place*, 29 Ind. 577. And a written contract, supposed to be voidable by reason of fraud, may be affirmed by parol; and if a party with full knowledge of all the facts expressly re-affirms such contract, he is estopped from afterward disaffirming it by the principle of estoppel *in pais*. *Bronson* v. *Wiman*, 10 Barb. 406.

The *bona fide* holder of a note, purchased on the written statement of the maker that it is business paper, and will be paid at maturity, can recover against him, though the statement proves untrue. *Lynch* v. *Kennedy*, 34 N. Y. (7 Tiff.) 151. So, the maker of a promissory note is estopped from setting up, in an action upon the note, that the name of the payee mentioned therein is not his proper name. *Davis* v. *David*, 1 Greene (Iowa), 427. So, if the defendant makes a note payable to the plaintiff generally, he is estopped to set up in defense that the plaintiff was only the agent for others in whom is the beneficial interest. *Grigsby* v. *Nance*, 3 Ala. 347. And a party to a charter-party, which acknowledges the property in a vessel to be in another party to it, is estopped to deny this to one who has given credit to the latter on the faith of it. *Hostler* v. *Hays*, 3 Cal. 302.

Where the plaintiff was induced to delay suing by the defendant's

agreement to submit the controversy to arbitration, and to abide by and perform the award, which he failed to do, these facts, though not an exception recognized in the statute of limitations, may yet estop the defendant from setting up the statute. *Davis* v. *Dyer*, 56 N. H. 143.

And, as a general principle, where the parties to a contract have mutually recognized its binding force upon them, by performance in part of its conditions and otherwise, each will be thereby estopped from denying its obligation upon both. *Richmond* v. *Dubuque, etc., R. R. Co.*, 33 Iowa, 422.

§ 11. **What written contracts will not estop.** The doctrine of estoppel has no application to a case where the party whom it was sought to estop was induced, by the fraud of the other party, to enter into the contract relied on as an estoppel. *Rochester Ins. Co.* v. *Martin*, 13 Minn. 59; *Thorne* v. *Mosher*, 20 N. J. Eq. 257. A party can never be estopped by an act that is illegal and void. *Mattox* v. *Hightshue*, 39 Ind. 95.

Partial payments to a holder, on a promissory note, and indorsements thereon in the maker's own handwriting, do not estop the maker from afterward disputing such holder's title to it. *Lounsbury* v. *Depew*, 28 Barb. 44. So, it was held that an aged and ignorant widow, signing her name by cross-mark on the back of a note of the estate as "sole legatee," was not estopped to deny that she had any title to the note. *Stagg* v. *Linnenfelser*, 59 Mo. 336. And a married woman, who has made a written contract for the sale of real estate in which her husband did not join, and without any acknowledgment, is not estopped from recovering the land, by declarations by her or her husband, or by having allowed costly improvements. *Glidden* v. *Strupler*, 52 Penn. St. 400.

And it is a rule applicable generally, that the rights of a party under a contract are not impaired by his expressing the opinion that he has no such rights, provided others have not acted upon the faith of such expressions. *Hildreth* v. *Pinkerton Academy*, 29 N. H. 227. And see *Mayer* v. *Ramsey*, 46 Tex. 371.

§ 12. **When a petition will estop.** A petition will, in some cases, operate as an estoppel. Thus, one who petitions the legislature for a grant of land, stated by him to be vacant, and accepts a grant, is estopped to deny that it was vacant. *Tubbs* v. *Lynch*, 4 Harr. (Del.) 521. So, one who has subscribed for a share in a corporation, has addressed petitions to the directors of the corporation by that name, and has acted, at a meeting of the members, on a committee to report by-laws for the corporation, is estopped to deny the existence of the

corporation, in a suit brought by it against him for an assessment. *South Bay Meadow Dam Co.* v. *Gray*, 30 Me. 547.

§ 13. **When a petition will not estop.** But it is held that a party is not estopped, by his petition to the legislature praying that they would grant him certain land, from setting up his title to such land. *Owen* v. *Bartholomew*, 9 Pick. 520. And where parties petition city authorities to have improvements made, they must be understood as requesting that the work be done as provided by law, and they will not be estopped to object that the proceedings upon their petition have been conducted in disregard of law. *Steckert* v. *East Saginaw*, 22 Mich. 104. So, if city authorities be petitioned to repave and curb a street, and injury is done to a petitioner in the course of such repaving, he will not be estopped, by reason of his petition, to show, in an action of trespass, that the repaving and curbing were done out of the limits of the street. *Quinn* v. *City of Paterson*, 27 N. J. Law, 35.

A creditor united with his debtor in a petition for the discharge of the latter under the insolvent act, and subsequently executed to him a general release. After this, the debtor presented the petition, with his own affidavit and that of the creditor, verifying the indebtedness, and it was held, that the admission in his affidavit did not estop the debtor in a subsequent suit, from denying the indebtedness and availing himself of the release. *Maybee* v. *Sniffen*, 16 N. Y. (2 Smith) 560; affirming S. C., 2 E. D. Smith (N. Y.), 1.

§ 14. **Notices as estoppels.** Where a person has notice that land owned by him is about to be sold on execution against another, he is bound to give notice of his claim, and mere possession of the premises by him is not sufficient notice. *Keeler* v. *Vantuyle*, 6 Penn. St. 250.

If the interest of A. in lands, the title of which is in B., is levied on, B., having been present at the sale and giving notice of his title, he is not estopped from afterward asserting his title by the fact that he also bid at the sale. *Goodson* v. *Beacham*, 24 Ga. 150.

So, a tenant in common, whose deed is on record, and who, being present when the land is put up at sheriff's sale, under a judgment against his co-tenant, causes notice to be given that it was only the interest of the judgment debtor which was being sold, is not estopped from asserting his title against the purchaser. *Hill* v. *Epley*, 31 Penn. St. 331.

A cashier, sued for alleged negligence in not selling bank shares as agreed, is not estopped to show the facts as to the proposed sale, although he had notified the owner of the shares that he supposed and had been informed that a sale had been effected. *Washburn* v. *Blake*, 47 Me. 316.

§ 15. **Certificates as estoppels.** In the case of a certificate that a mortgage or other instrument is good and valid, it is not sufficient to create an estoppel that the certificate was believed to be a protection, as matter of law; but the facts stated therein must be believed and relied on as true, and there must be a change of position induced by such reliance upon their truth. *Eitel* v. *Bracken*, 6 Jones & Sp. (N. Y.) 7; *Weil* v. *Fischer*, 10 id. 32; *Wilcox* v. *Howell*, 44 Barb. 396; S. C. affirmed, 44 N. Y. (5 Hand) 398. Where, on the assignment of a mortgage to the complainant, the mortgagor gave a written certificate that the mortgage was a valid lien upon the premises, that it was given for a part of the purchase-money, and that there then existed no legal or equitable defense thereto — it was held that he was estopped, in equity, by his own representation, from setting up the defense of usury on the foreclosure of the mortgage. *Scott* v. *Sadler*, 52 Penn. St. 211; *Diercks* v. *Kennedy*, 16 N. J. Eq. 210. It is however held that where such certificate is signed by the mortgagor, without knowledge of, and by reason of misrepresentations made in regard to its contents, he is not thereby estopped from setting up the invalidity of the mortgage. *Nichols* v. *Nussbaum*, 10 Hun (N. Y.), 214; *Wilcox* v. *Howell*, 44 Barb. 396; S. C. affirmed, 44 N. Y. (5 Hand) 398.

A depositary who gives a certificate of deposit for "current bank notes," is estopped from showing that the funds received were not current, or from claiming the right to pay in any thing but the same character of funds. *Osgood* v. *McConnell*, 32 Ill. 74. So, A giving B a bill of parcels of goods, and a certificate that he held them on storage for B, is estopped to say he never had the goods. *Chapman* v. *Searle*, 3 Pick. 38.

Where a certificate of a justice of the peace is offered in evidence against him in any cause where he is a party, the certificate being his official act, done under the sanction of his oath, in the performance of a duty imposed on him by law, though under some circumstances it may be impeached by others, he is precluded from denying the truth of what he has officially certified. *Matthews* v. *Dare*, 20 Md. 248.

§ 16. **Receipts as estoppels.** A receipt is an admission only, and the general rule is, that an admission, though evidence against the person who made it, and those claiming under him, is not conclusive evidence, except as to the person who may have been induced by it to alter his condition. *Graves* v. *Key*, 3 Barn. & Ad. 313; *Baker* v. *Union Mut. Life Ins. Co.*, 43 N. Y. (4 Hand) 283. But when acted upon by a third person, a receipt may estop the party giving it from denying its purport. Thus, when a warehouseman issues a warehouse receipt, he puts it into the power of the holder to treat with the public

on the faith of it. He enables him to say, and to induce others to believe, that he has certain property which he can sell or pledge for a loan of money. If the warehouseman gives to the party who holds such receipt a false credit, he will not be suffered to contradict the statement which he has made in the receipt, so as to injure a party who has been misled by it. *McNeil* v. *Hill*, Woolw. 96. And see *Gibson* v. *Chillicothe Bank*, 11 Ohio St. 311; *Gardiner* v. *Suydam*, 7 N. Y. (3 Seld.) 357.

So, if one, with full knowledge of all the facts, receipts for property attached, he is estopped to claim the property adversely to the attachment. *Bursley* v. *Hamilton*, 15 Pick. 40; *Bleven* v. *Freer*, 10 Cal. 172; *Dresbach* v. *Minnis*, 45 id. 223. See, also, *Single* v. *Barnard*, 29 Wis. 463. And the defendant in an attachment, who has joined in giving a receipt for goods seized, reciting that they are his property, on the faith of which receipt the officer has forborne to search for other property to satisfy the process, is estopped to move to vacate the levy, on the ground that he is not the owner. *Easton* v. *Goodwin*, 22 Minn. 426. But, in an action by an attaching officer against a receiptor, the latter is not estopped by a receipt, reciting the value of the goods and that they are free from incumbrances, and agreeing to give them up when the officer should appoint, from setting up the intervening bankruptcy and discharge of the defendants in attachment. *Lewis* v. *Webber*, 116 Mass. 450. And a person receipting to the sheriff for goods as the goods of another, and redelivering them, is not afterward estopped to deny that they were the property of the other. *Johns* v. *Church*, 12 Pick. 557.

And one who, through mistake, receipts, as guardian of another for money, which is in fact his own, is not estopped to show his right to retain such money to his own use. *Spangler's Appeal*, 24 Penn. St. 424.

§ 17. **Acquiescence as an estoppel.** It is said that there is no principle better established, nor one founded on more solid considerations of equity and public utility, than that which declares that if one man, *knowingly*, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterward be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel. *Wendell* v. *Van Rensselaer*, 1 Johns. Ch. 344, 354; *Philhower* v. *Todd*, 11 N. J. Eq. 312; *Tilton* v. *Nelson*, 27 Barb. 595; *Carpenter* v. *O'Dougherty*, 67 id. 397. But a party will not be estopped from setting up a claim to property, by acquiescing in

the acts of another with regard to it, unless he is acquainted with his rights. *Buckingham* v. *Smith*, 10 Ohio, 288. It is *knowingly* allowing another to make improvements, knowing that he believes he has a good title, that constitutes the fraud, to prevent which the owner is held estopped. *McGarrity* v. *Byington*, 12 Cal. 426; *Morris* v. *Moore*, 11 Humph. (Tenn.) 433.

Where the owners of adjoining lands have acquiesced, for a time equal to that prescribed by the statute of limitation to bar a right of entry, in the location of a division line between their lands, although it may not be the true line, according to the calls of their deeds, yet they are thereafter estopped from objecting to it. *Sneed* v. *Osborn*, 25 Cal. 619; *Columbet* v. *Pacheco*, 48 id. 395. And see *Lindell* v. *McLaughlin*, 30 Mo. 28; *Gove* v. *White*, 23 Wis. 282. But the right of heirs, while minors, is not affected by any acquiescence in a mistaken boundary line for the true line, by their guardian, or by the administrator of the intestate's estate. *Burnell* v. *Malony*, 36 Vt. 636. And it is held that the legal title of the owner of land is not divested by his acquiescence in the erection of a wall or building thereon. He is not thereby estopped, at least at law, from asserting his right to the land, although such acquiescence may be deemed a license so as to preclude him from afterward maintaining trespass for the erection. *Miller* v. *Platt*, 5 Duer (N. Y.), 272.

As a general rule, long acquiescence in accounts rendered is *prima facie* evidence of their correctness. *Hopkirk* v. *Page*, 2 Brock. (C. C.) 20; *Barry* v. *Barry*, 3 Cranch (C. C.), 120; *Wiggins* v. *Burkham*, 10 Wall. (U. S.) 129; *Guernsey* v. *Rexford*, 63 N. Y. (18 Sick.) 631. He to whom an account is rendered is bound, within a reasonable time, to examine the same and object if he dispute its correctness; and if he omit to do so, he will be deemed, from his silence, to have acquiesced and will be bound by it as an account stated. *Lockwood* v. *Thorne*, 11 N. Y. (1 Kern.) 170; *Avery* v. *Leach*, 9 Hun (N. Y.), 106. Vol. 1, pp. 191, 195.

It has been held that the payment of taxes for a number of years, under an irregular levy, without objection, will not estop the party paying from afterward objecting to the validity of another assessment made in the same manner *Cruger* v. *Dougherty*, 43 N. Y. (4 Hand) 107.

Where a husband in possession of lands, belonging to his deceased wife, claimed it as his own and devised it to one of his sons for life, with remainder to his other children, it was held that the mere acquiescence of the latter in the long-continued possession of the

devisee for life did not estop them from setting up the title derived from their mother. *Tulloch* v. *Worrall*, 49 Penn. St. 133.

§ 18. **Disclaimer as an estoppel.** A person who disclaims all interest in land to one whom he knows is about to purchase it, and who relies on such disclaimer in consummating his purchase, is not estopped from seting up title to the land, provided he made the disclaimer in ignorance of his title, and not with intent to deceive, or with gross carelessness. *Davis* v. *Davis*, 26 Cal. 23; *Keys* v. *Test*, 33 Ill. 316. So, one who has denied owning certain property may afterward retract such disclaimer, if no one is injured thereby. *Frith* v. *Siler*, 32 Ga. 665.

*Coverture* confers no privilege or license to commit either fraud or falsehood under sanction of an oath. If, therefore, a married woman makes a solemn disclaimer on oath, in a deposition or otherwise, of title to chattels which are legally hers, she is estopped from thereafter claiming them. *Cooley* v. *Steele*, 2 Head (Tenn.), 605.

§ 19. **Receiving value when an estoppel.** A party having sold and taken pay for an article as his sole property, and having thereby impliedly warranted such a title he is estopped from showing a different title. *Starr* v. *Anderson*, 19 Conn. 338. So, if a party receive the purchase-money of land sold, he affirms the sale by this act and cannot claim against it, whether it was void or only voidable. *Maple* v. *Kussart*, 53 Penn. St. 348; *Stroble* v. *Smith*, 8 Watts, 280. And where a person *sui juris* takes a balance from the sheriff, being the proceeds of a sale of lands, such person is estopped from denying that he was a party to the action which resulted in the sale. *Wilkins* v. *Anderson*, 11 Penn. St. 399. And see *Ingram* v. *Hartz*, 48 id. 380; *Southard* v. *Perry*, 21 Iowa, 488. If money is received by a firm for a conveyance by one member of it of land owned by the firm, the other members of it and their representatives are estopped to repudiate the sale and claim a title to the land against the *bona fide* purchaser. *Moran* v. *Palmer*, 13 Mich. 367. And an heir at law, who, upon an accounting of the administrator, knowingly receives from the court, in which such accounting is had, a certain sum as his share of the proceeds of land sold by such administrator, is estopped in equity from denying the validity of the sale. *In re Place*, 7 N. Y. Leg. Obs. 27; S. C., 1 Redf. (N. Y.) 276.

But it is held that the acceptance of payment for lands, under protest of fraud, works no estoppel of showing fraud or waiver, when specific performance is called for by a bill in equity. *Russell* v. *Amador*, 3 Cal. 400. And where the executor of the tenant for life collected certain rents and paid over part to the heirs in remainder, claiming that

the balance belonged to him, and they received the part paid to them without making further claim, it was held that they were not precluded from suing for the balance. *Marshall* v. *Moseley*, 21 N. Y. (7 Smith) 280.

Where one accepts a benefit under an award, he is estopped from denying its validity, and it is immaterial whether the award was made under the submission or not. *Kellogg* v. *United States*, 1 Ct. of Cl. 310; *Snow* v. *Walker*, 42 Tex. 154. And where a road is ordered to be opened, and the owner of land over which it passes received the money awarded to him as damages by the commissioners of highways, he is estopped from alleging that the proceedings were void. *Kile* v. *Town of Yellowhead*, 80 Ill. 208.

§ 20. **Silence, when an estoppel.** It is a familiar equitable principle that, if a person by his silence encourages an act to be done, or consents to it, he cannot afterward exercise his legal right in opposition to such consent. *Blackwood* v. *Jones*, 4 Jones' (N. C.) Eq. 54; *Hall* v. *Fisher* 9 Barb. 17. Thus, a sale or pledge of property by one who has no title, in the presence of the owner, who remains silent, estops the latter from impeaching the transaction on the ground of his better title. *Hibbard* v. *Stewart*, 1 Hilt. (N. Y.) 207; *Meister* v. *Birney*, 24 Mich. 435; *Governor* v. *Freeman*, 4 Dev. (N. C.) L. 472; *Mason* v. *Williams*, 66 No. Car. 564. So, if a party stands by and sees the defendant converting his goods and material in any way to his own use, without protest, and such knowledge of their use can be shown, he is estopped from claiming the property. *Hogan* v. *Brooklyn*, 52 N. Y. (7 Sick.) 282. So, a party, who sees his promissory note transferred by the holder to a *bona fide* purchaser for a valuable consideration, without giving notice of any defense or set-off which he may claim against it, although the note is not in form negotiable, is estopped from setting up such defense or set-off against the purchaser. *Decker* v. *Eisenhauer*, 1 Penr. & W. (Penn.) 476; *Tylee* v. *Yates*, 3 Barb. 222. The rule extends to infants and *femes covert*. *Davis* v. *Tingle*, 8 B. Monr. (Ky.) 539; *Dann* v. *Cudney*, 13 Mich. 239; *Sindall* v. *Jones*, 57 Ga. 85. And it applies not only where a proposition is made to one which he is bound to deny or admit, but also where he is silent in the face of facts which fairly call upon him to speak. *Abbot* v. *Hermon*, 7 Me. 118; *Preston* v. *American Linen Co.*, 119 Mass. 400. Thus, in an action to recover the value of one-half of a party-wall erected by the plaintiff, partly on his estate and partly on that of the defendant, the jury may, in the absence of an express agreement as to payment on the defendant's part, infer a promise to pay, if the plaintiff undertook and completed the wall with the expectation that the defendant would pay him for it, and

the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection. *Day* v. *Caton*, 119 Mass. 513; 20 Am. Rep. 347.

A party claiming an interest in land, who sees it conveyed to others without objection, or without giving notice of his own claim, is estopped from afterward setting it up as against that conveyance. *Cady* v. *Owen*, 34 Vt. 598; *Nixon* v. *Carco*, 28 Miss. 414; *Shapley* v. *Rangeley*, 1 Woodb. & M. 213; *Brothers* v. *Porter*, 6 B. Monr. (Ky.) 106; *Cochran* v. *Harrow*, 22 Ill. 345; *Thompson* v. *Sanborn*, 11 N. H. 201; *Trapnall* v. *Burton*, 24 Ark. 371. And where heirs stand silently by for years, while the occupant of land sold by the administrator is making valuable and lasting improvements on the property, and redeeming it from the lien of the ancestor's debts, they will be estopped from afterward asserting their claim. *Evans* v. *Snyder*, 64 Mo. 516. But, in order to constitute an equitable estoppel by standing by, without objection, and witnessing a sale of land, or the erection of valuable buildings thereon, it is indispensable that the party to be precluded should have been fully apprised of his title, and the other party, at the same time, being ignorant of such adverse title, should have been misled by such acquiescence, and induced thereby to change his position. *Whitaker* v. *Williams*, 20 Conn. 98; *Odlin* v. *Gove*, 41 N. H. 465; *Woods* v. *Wilson*, 37 Penn. St. 379. And see *Dillett* v. *Kemble*, 25 N. J. Eq. 66.

A party and his privies are estopped from asserting claim to land by his being a party to a suit in which the land was subjected and sold as the property of others, and by failing to assert or set up his claim therein, and by standing by and seeing it sold to a purchaser who had a right to believe he was getting a clear title to the land. *Morris* v. *Shannon*, 12 Bush (Ky.), 89. So, one whose lands would be liable to assessment for expenses of a local improvement if regularly ordered and made, and who, knowing the facts, suffers the work to be done without objecting, is estopped from enjoining the collection of the assessment. *Quinlan* v. *Myers*, 29 Ohio St. 500.

A stockholder of a corporation who knows all the facts and of all the proceedings in bankruptcy, and remains silent for nearly a year after the adjudication, will not be heard after that lapse of time to impeach its correctness. *Re Baltimore County Dairy Association*, 11 Bankr. Reg. 253. So, a party fully cognizant of his rights, having permitted a public corporation to expend large sums of money in laying down and completing its railroad tracks in contravention of his rights, and having made no complaint, nor attempted to interfere, till many years had elapsed, was held to be estopped by such acquiescence,

from relief by injunction. *Baltimore, etc., R. R. Co.* v. *Strauss*, 37 Md. 237.

§ 21. **Silence when not an estoppel.** The omission to assert a right, from ignorance of it, does not constitute an estoppel. *Colbert* v. *Daniel*, 32 Ala. 314. Nor does the silence of one party create an estoppel where the other was fully acquainted with the true facts, and so could not be misled. *Plummer* v. *Mold*, 22 Minn. 15; *Frost* v. *Koon*, 30 N. Y. (3 Tiff.) 428; *Woodward* v. *Wilcox*, 27 Ind. 207; *Edwards* v. *Evans*, 16 Wis. 181.

If a married woman is present at an unauthorized sale of her separate personal property, by one professing to act as her trustee, her failure to object to the sale will estop her from afterward questioning its validity (*Wilks* v. *Fitzpatrick*, 1 Humph. [Tenn.] 54; *Beckett* v. *Cordley*, 1 Bro. Ch. 353), but if she is not actually present at the sale, the mere fact that she has knowledge of it, and fails to object, does not operate as an estoppel against her, nor will she be estopped by her failure to object to an unauthorized sale by her husband, in her presence, unless her silence was fraudulent, and not the result of marital restraint. *Drake* v. *Glover*, 30 Ala. 382; *Sindall* v. *Jones*, 57 Ga. 85.

The fact that a party who has an interest in having certain work well done, and the materials furnished therefor of a certain quality, stands by and sees work done and materials used of a character inferior to that called for, will not operate as an estoppel or waiver of his right to thereafter object, where it does not appear that such party had sufficient knowledge to enable him to detect the defects and make the proper objections thereto. *Hexter* v. *Knox*, 7 Jones & Sp. (N. Y.) 109; S. C. affirmed, 63 N. Y. (18 Sick.) 561.

The owner of property is justified in relying upon his title, and he is under no obligations to proceed against all persons who may assert a hostile title, although another person might be deceived by the apparent genuineness of such hostile title. It is not the duty of the owner of real estate, if his own interests do not require it, to attack a forged deed to his property. *Meley* v. *Collins*, 41 Cal. 663; S. C., 10 Am. Rep. 279.

One who stands by and sees another assert title to and give a mortgage upon his own land is not estopped from setting up title thereto, if he gives notice to the mortgagee of his title, and the mortgagee acts with a full knowledge of the truth of the matter. *Carroll* v. *Turner*, 54 Ga. 177. And one who holds duly recorded incumbrances of land is not bound to give notice to a subsequent purchaser without actual notice, who erects valuable improvements. The record being con-

structive notice, no presumption of acquiescence can arise from the silence of the incumbrancer. *Mayo* v. *Cartwright*, 30 Ark. 407. So, merely standing by, at a sale, without objection, does not amount to an estoppel, where the title depends on the construction of a will, the existence of which is known to both parties, though both suppose that, by force of it, the title passes by the sale. *Tongue* v. *Nutwell*, 17 Md. 212.

And an owner of property, who is aware that other persons are about to buy and sell it under the mistaken opinion that they have a right to do so, may recover its value when it is so sold in his absence, and he has said and done nothing to cause or encourage the mistake, although he fails to give notice of it. *Bragg* v. *Boston, etc., R. R. Co.*, 9 Allen, 54.

In a recent case in Michigan, in which the cases are reviewed at length, it is held that the doctrine of estoppel, as that an owner of property who stands by in silence and sees it affected by acts of one who has no right is estopped from asserting his title, afterward, to the prejudice of innocent third persons, is not as broadly applicable to cases involving the legal title to real estate as to those where only personalty is in question; for the statute of frauds requires that interests in lands shall be transferred only by deed. *Hayes* v. *Livingston*, 34 Mich. 384; S. C., 22 Am. Rep. 533. The doctrine may, however, be applied to voluntary adjustments of boundaries between contiguous estates, since, in these cases, title is not deemed to be transferred, but only the limits of ownership are determined (Id.; *Stewart* v. *Carleton*, 31 Mich. 270, *Spiller* v. *Scribner*, 36 Vt. 245; *McAfferty* v. *Conover*, 7 Ohio St. 99); and it also applies to dedications of land to public uses, for dedications are not within the statute of frauds. *Hayes* v. *Livingston*, 34 Mich. 384; S. C., 22 Am. Rep. 533. See, also, *Noyes* v. *Ward*, 19 Conn. 250.

A failure to remonstrate against the erection of a nuisance will not be held an estoppel. *Burt* v. *Smith*, 3 Phil. (Penn.) 363. And it is held that a person, across whose land a highway is laid out, is not estopped from disputing its validity by reason of having been present when it was laid out, taking no part in the proceedings, and failing to make any objections to its being laid out and established. *Roehrborn* v. *Schmidt*, 16 Wis. 519. So where the defendant opened a stone quarry on land he claimed to own, but which belonged to the plaintiff, and took stone therefrom without objection on the part of the plaintiff, it was held that the plaintiff was not estopped from asserting title to such land. *Jamison* v. *Cornell*, 5 N. Y. Sup. Ct. (T. & C.) 629; S. C., 3 Hun, 557.

§ 22. **Tenant cannot deny landlord's title.** It is a well-settled general rule, said to be founded on reasons of public policy, that a tenant shall never be permitted to controvert his landlord's title, or set up against him a title acquired by himself during his tenancy, which is hostile in its character to that which he acknowledged in accepting the demise *Doe* v. *Smythe*, 4 Maule & Sel. 347; *Doe* v. *Baytup*, 3 Ad. & El. 188; *Bertram* v. *Cook*, 32 Mich. 518; *Jackson* v. *Harper*, 5 Wend. 246; Tayl. L. & Ten., § 705. And see Vol. 4, p. 258 *et seq.* The rule applies to the case of a tenant holding over, as well as to that of an under-tenant, assignee, or other person claiming under the lessee (Id.; *Earle* v. *Hale*, 31 Ark. 470; *Jackson* v. *Stiles*, 1 Cow. 575; *Vernam* v. *Smith*, 15 N. Y. [1 Smith] 327; *Binney* v. *Chapman*, 5 Pick. 124); and is also applicable to every species of tenancy, whether for years, at will, or by sufferance. *Coburn* v. *Palmer*, 8 Cush. 124; *Williams* v. *Mayor of Annapolis*, 6 Harr. & J. (Md.) 529. And the principle of estoppel, which prevents a tenant from denying his landlord's title, applies to the relation that exists between the hirer and letter of a house, standing upon the land of a third person as personal estate. *Ryder* v. *Mansell*, 66 Me. 167. And though a contract of renting is void under the statute of frauds as a lease, if the tenant enters and occupies under it, the relation of landlord and tenant is thereby created. The tenant owes to the landlord the fealty, and the landlord owes to the tenant the duty, which are the inseparable incidents of a lease executed in the manner the statute of frauds prescribes. The landlord may by distress, or other legal remedies, collect his rent, and the tenant may retain the possession against any known process of law. It follows, in an action for the recovery of rent or of possession, that the tenant is estopped from denying the title of the landlord, unless he can show a *bona fide* eviction, under a paramount title, or that the title of the landlord pending the occupancy was extinguished. *Crawford* v. *Jones*, 54 Ala. 459; *English* v. *Key*, 39 id. 113; *Gudgell* v. *Duvall*, 4 J. J. Marsh. (Ky.) 229; *Fuller* v. *Sweet*, 30 Mich. 237; 18 Am. Rep. 122; *St. John* v. *Quitzow*, 72 Ill. 334. A tenant is not estopped to deny his landlord's title, after that title, under which his own tenancy began, has ended and the estate has become vested in the tenant himself. *Ryder* v. *Mansell*, 66 Me. 167; *Isaac* v. *Clark*, 2 Gill (Md.), 1; *Miller* v. *McBrier*, 14 Serg. & R. 382. Nor is a tenant estopped to set up the title of one who has purchased the fee of the land at a sheriff's sale on execution against the landlord in defense of the landlord's action for rent accruing after the sale; for the purchaser, as assignee of the reversion, is entitled to after-accruing rent. *Lancashire* v. *Mason*, 75

N. C. 455. See, also, *Elliott* v. *Smith*, 23 Penn. St. 131; *Bettison* v. *Budd*, 17 Ark. 546; *Higgins* v. *Turner*, 61 Mo. 249.

If a tenant enters into possession of premises under a parol lease made by the attorney of a corporation, the tenant will not be permitted to dispute the agent's authority, if the company subsequently ratifies the agent's act. *Brahn* v. *Jersey City Forge Co.*, 38 N. J. L. 74.

The rule, that one holding under a lease shall not dispute his lessor's title, does not, however, apply where one having no title, by trick or artifice, induces another in possession to take a lease (*Thayer* v. *Society of United Brethren*, 20 Penn. St. 60); and a purchaser from the lessor is accordingly put upon inquiry. But it is otherwise, if the lessor had even an inchoate or partially defective title. *Evans* v. *Bidwell*, 76 id. 497.

As it respects the relation of mortgagor and mortgagee, it is held that, when the mortgagor retains possession, a relation is created similar to that of landlord and tenant, and the mortgagor is estopped to deny the title of the mortgagee, unless, after a distinct disclaimer brought to the knowledge of the latter, he has acquired a title by adverse possession. *Higginbotham* v. *Barton*, 11 Ad. & El. 307; *Hitchman* v. *Walton*, 4 Mees. & W. 409; *Willison* v. *Watkins*, 3 Pet. (U. S.) 43; *Vance* v. *Johnson*, 10 Humph. (Tenn.) 214; Bigel. on Estop. 413. And see *Baker* v. *Whiting*, 3 Sumn. (C. C.) 475; *Merriam* v. *Hassam*, 14 Allen, 516.

§ 23. **Bailee cannot deny bailor's title.** The position of an ordinary bailee, where there has been no special contract or misrepresentation on his part, is very analogous to a tenant who, having accepted the possession from another, is estopped from denying his landlord's title, but whose estoppel ceases when he is evicted by title paramount. Thus, it is the well-settled general rule, that one who has received property from another as his bailee, or agent, or servant, must restore or account for that property to him from whom he received it (see *Vosburgh* v. *Huntington*, 15 Abb. Pr. [N. Y.] 254; *Osgood* v. *Nichols*, 5 Gray, 420); but a bailee is not estopped from disputing the title of his bailor, and setting up the *jus tertii*, where the bailment has been determined by what is equivalent to an eviction by title paramount. *Biddle* v. *Bond*, 11 Jur. (N. S.) 425; S. C., 34 L. J. Q. B. 137. And see *Hardman* v. *Willcock*, 9 Bing. 382; *Hayden* v. *Davis*, 9 Cal. 573; *King* v. *Richards*, 6 Whart. (Penn.) 418. In New York it is held that the proposition that a bailee cannot deny the title of his bailor has no application to a case where the bailee has been compelled by action, of which the bailor had notice, to pay for the property to one having the true

title. *Cook* v. *Holt*, 48 N. Y. (3 Sick.) 275. See, also, *New York, etc., R. R. Co.* v. *Haws*, 3 Jones & Sp. (N. Y.) 372.

It is held that the estoppel does not prevail against a vendee of the bailee. *McFerrin* v. *Perry*, 1 Sneed (Tenn.), 314. And it seems that a warehouseman, being a bailee of goods, is not estopped from disputing the title of the bailor; but that, if the goods are the property of another, he may refuse to redeliver them, if he does so relying upon the right and title, and by the authority of that other. *Thorne* v. *Tilbury*, 3 Hurl. & N. 534. See *Woodley* v. *Coventry*, 2 Hurl. & Colt. 164.

§ 24. **Genuineness of commercial paper.** See *ante*, pp. 698, 699, §§ 10, 11. The doctrine of estoppel arising out of the acceptance and the indorsement of commercial paper, stated in general terms is this, that the acceptance of a bill and the indorsement of a bill or note, are a conclusive admission that the signature of the drawer in the one case, and of all the prior parties in the other, is genuine. Bigel. on Estopp. 427. The drawee of a bill of exchange is bound to know the handwriting of his correspondent, the drawer; and if he accepts or pays a bill in the hands of a *bona fide* holder for value, he is concluded by the act, although the bill turns out to be a forgery. If he has accepted, he must pay; and if he has paid, he cannot recover the money back (*Levy* v. *Bank of United States*, 1 Binn. [Penn.] 27; S. C., 4 Dall. 234; *Phillips* v. *Im Thurn*, L. R., 1 C. P. 463; *Peoria, etc., R. R. Co.* v. *Neill*, 16 Ill. 269; *Goddard* v. *Merchants' Bank*, 4 N. Y. [4 Comst.] 149; *Nat. Park Bank* v. *Ninth Nat. Bank*, 46 N. Y. [1 Sick.] 77; S. C., 7 Am. Rep. 310; *Allen* v. *Williamsburgh Savings Bank*, 69 N. Y. [24 Sick.] 314); but it is otherwise by statute in Pennsylvania. *Tradesmans' Bank* v. *Third Nat. Bank*, 66 Penn. St. 435. So, it is a well-settled rule that, if the drawee, in good faith, and without negligence, pay, even to an innocent holder, a check which has been fraudulently altered in amount after it left the hands of the drawer, he will, ordinarily, be entitled to recover back, from the person to whom it was paid, the excess over the true amount of the check. *Redington* v. *Woods*, 45 Cal. 406; S. C., 13 Am. Rep. 190. And see *Hall* v. *Fuller*, 5 Barn. & C. 750; *Worrall* v. *Gheen*, 39 Penn. St. 388; *Ellis* v. *Ohio Ins. Co.*, 4 Ohio St. 628; *Nat. Bank of North America* v. *Bangs*, 106 Mass. 441; S. C., 8 Am. Rep. 349. Vol. 1, pp. 507, 508.

It has been held that a forgery is incapable of ratification. *Brook* v. *Hook*, L. R., 6 Exch. 89. On the other hand, it is held that where a forged note has been presented to the apparent maker of it for payment, who did not repudiate it, but deceived its holder by language and acts calculated to induce a reasonable belief that the note was genuine,

although, thereby, he may not be regarded as *adopting* the note as his own, still, he will be *estopped* from denying his liability thereon, if the holder, acting upon the belief thus created, has suffered damage, or neglected to enforce any remedy he might have had against the other party. *Forsyth* v. *Day*, 46 Me. 176. Vol. 1, pp. 233, 234. See, also, *Howard* v. *Duncan*, 3 Lans. (N. Y.) 174; *Greenfield Bank* v. *Crafts*, 4 Allen, 447; *Union Bank* v. *Middlebrook*, 33 Conn. 95; *Livings* v. *Wiler*, 32 Ill. 387; *Hefner* v. *Vandolah*, 57 id. 520; S. C., 11 Am. Rep. 39. So, a party indorsing a promissory note impliedly affirms its genuineness, as well as that of all previous indorsements. *Woodward* v. *Harbin*, 1 Ala. 104; *Coggill* v. *American Exchange Bank*, 1 N. Y. (1 Comst.) 113; *Lloyd* v. *Burns*, 6 Jones & Sp. (N. Y.) 423; S. C. affirmed, 62 N. Y. (17 Sick.) 651. And if the maker of a note makes it payable to a fictitious person, and puts it in circulation with the fictitious name written on it, or if he makes it payable to a real person and forges his indorsement or procures it to be done, and then puts it in circulation, he is estopped to say that it is not genuine. *Fort* v. *Meacher*, Riley (S. C.), 248; 3 Hill (S. C.), 227. And see *Faris* v. *Peck*, 40 How. (N. Y.) 484; S. C., 2 Sweeny, 689; 10 Abb. (N. S.) 55; Vol. 1, pp. 599 *et seq.*

§ 25. **Capacity of parties to such a paper.** It is a general principle, applicable to all negotiable securities, that a person shall not dispute the power of another to indorse such an instrument, when he asserts by the instrument which he issues to the world that the other has such power. *Drayton* v. *Dale*, 2 Barn. & C. 293. Thus, in an action on a bill of exchange, against the acceptors, who pleaded that the drawers, who were also payees and indorsers, were a body corporate, having no authority to draw, indorse, issue or negotiate bills of exchange, the plea was held bad on demurrer. *Halifax* v. *Lyle*, 3 Exch. 446. And it is held that the maker of a note cannot defend an action brought by an indorsee upon the ground that the payee was an infant. *Garner* v. *Cook*, 30 Ind. 331. See, also, *Hardy* v. *Waters*, 38 Me. 450; *Burrill* v. *Smith*, 7 Pick. 291. Nor can the acceptor of a bill plead that the drawer is a married woman, and he is estopped from denying or disputing her competency. *Cowton* v. *Wickersham*, 54 Penn. St. 302; *Smith* v. *Marsack*, 6 C. B. 486; *Erwin* v. *Downs*, 15 N. Y. (1 Smith) 575. And the guarantor of a bond is estopped to deny the competency of the makers of it. *Remsen* v. *Graves*, 41 N. Y. (2 Hand) 471. See, also, *Arnot* v. *Erie Railway Co.*, 5 Hun (N. Y.), 608; S. C. affirmed, 67 N. Y. (22 Sick.) 315.

It has, however, been held in an action upon a promissory note by an indorsee against the maker, that insanity in the payee and indorser *at*

*the time of the indorsement and transfer* was a valid defense. *Burke* v. *Allen*, 29 N. H. 106. See, also, *Peaslee* v. *Robbins*, 3 Metc. (Mass.) 164. But see *Allen* v. *Berryhill*, 27 Iowa, 534; S. C., 1 Am. Rep. 309.

§ 26. **Certifying checks.** The question of estoppel sometimes arises in cases relating to the certification of checks. And it was held by the court in Massachusetts, that the certification of checks is not within the inherent power of the office of teller, so as to bind the bank to pay the amount of it to any person who may become a *bona fide* holder. *Mussey* v. *Eagle Bank*, 9 Metc. (Mass.) 306. On the other hand, it is held that a *bona fide* holder, for value, of a check negotiable upon its face, and certified to be good by the paying teller of the bank on which it was drawn whose authority to certify is limited to cases where the bank has funds of the drawer in hand sufficient to cover the check, can enforce the payment of the check, although the drawer has not such funds and the check was certified by the teller without funds, in violation of his duty. *Farmers', etc., Bank* v. *Butchers', etc., Bank*, 16 N. Y. (2 Smith) 125. See, also, *Irving Bank* v. *Wetherald*, 36 N. Y. (9 Tiff.) 335; *Merchants' Bank* v. *State Bank*, 10 Wall. 604. So, in a more recent case in New York, it is held that although the cashier of a bank has no authority, as between him and the bank, to certify a check when the drawer has no funds, yet, as between the bank and a *bona fide* holder of a check so certified, as the certification is apparently within the scope of the authority of its cashier, the bank cannot dispute the fact that there are funds. *Cooke* v. *State Nat. Bank of Boston*, 52 N. Y. (7 Sick.) 96; S. C., 11 Am. Rep. 667. But a *bona fide* holder only can enforce the liability against the bank, in the absence of funds. Id. Banks clothe their officers with powers necessary to operate them successfully, and experience has shown the necessity of relying upon the representations of the proper officers of the banks as to the existence of funds to the credit of those drawing checks upon them. When these representations are made, sound policy requires that the banks shall be held responsible for their truth, and not be at liberty to show their falsity, as against *bona fide* holders of the checks who have purchased the same upon the strength of such representations. Any language, therefore, whether verbal or written, employed by an officer of a banking institution, whose duty it is to know the financial standing and credit of its customers, representing that a check drawn upon it is good, and will be paid, *estops* the bank from thereafter denying, as against a *bona fide* holder of the check, the want of funds to pay the same. See *Merchants' Nat. Bank* v. *State Nat. Bank*, 10 Wall. 604; *Irving Bank* v. *Wetherald*, 36 N. Y. (9 Tiff.) 335; *Girard Bank* v. *Bank of Penn.*, 39 Penn. St. 92; *Bickford* v. *First Nat. Bank*, 42 Ill. 238;

*Barnet* v. *Smith*, 30 N. H. 256; Vol. 1, pp. 507, 624; *Pope* v. *Bank of Albion*, 59 Barb. 226. But see S. C. reversed, 57 N. Y. (12 Sick.) 126.

§ 27. **Waiver of a legal right.** A waiver is the intentional relinquishment of a known right and there must be both *knowledge* of the existence of the right and an *intention* to relinquish it. *Hoxie* v. *Home Ins. Co.*, 32 Conn. 21, 40. A waiver, to be operative, must be supported by an agreement founded on a valuable consideration, or the act relied on as a waiver must be such as to *estop* a party from insisting on performance of the contract or forfeiture of the condition. *Ripley* v. *Ætna Ins. Co.*, 30 N. Y. (3 Tiff.) 136, 164; *Merchants' Mut. Ins. Co.* v. *Lacroix*, 45 Tex. 158. In the case first cited, it is said by MULLIN, J., "if my tenant agrees to pay me rent on a day named, or his lease will be forfeited, and if before the day I agree, for a valuable consideration, to waive the condition, I am bound by the agreement. If, without consideration, I agree that he may pay after the day, and he, by reason thereof, omits to pay at the day, I am *estopped* from enforcing a forfeiture. But if, without consideration, I assent to a waiver of payment at the day, but before the day withdraw my assent, and insist on performance in such season as to enable him to perform, I am not *estopped*." And see *Hutchins* v. *Smith*, 46 Barb. 235; *McCabe* v. *Dutchess Co. Mut. Ins. Co.*, 14 Hun (N. Y.), 599; *Maher* v. *Hibernia Ins. Co.*, 67 N. Y. (22 Sick.) 283.

In New York, and in some of the other States, a person contracting a debt cannot, by a contemporaneous and simple waiver of the benefit of the exemption laws, entitle the creditor, in case of failure to pay, to levy his execution, against the defendant's objection, upon exempt property. Such an agreement is held to be contrary to public policy and will not be enforced. *Kneettle* v. *Newcomb*, 22 N. Y. (8 Smith) 249; *Curtis* v. *O'Brien*, 20 Iowa, 376; *Maxwell* v. *Reed*, 7 Wis. 582; *Recht* v. *Kelly*, 82 Ill. 147. But, in Pennsylvania, such waiver of the benefit of the exemption law, embodied in the contract, and expressed in clear and unequivocal language, is valid and binding, and will be enforced. *Bowman* v. *Smiley*, 31 Penn. St. 225; *O'Nail* v. *Craig*, 56 id. 161. See, also, *State* v. *Melogue*, 9 Ind. 196; *Eltzroth* v. *Webster*, 15 id. 21.

§ 28. **Defense, how interposed.** It has been said that, at common law, a technical estoppel, that is, one by deed or matter of record, must be specially pleaded, and that if not, it is waived. See *Vooght* v. *Winch*, 2 B. & Ald. 662; *Hostler* v. *Hays*, 3 Cal. 302; *Gray* v. *Pingry*, 17 Vt. 419; *Welland Canal Co.* v. *Hathaway*, 8 Wend. 480; *Doe* v. *Huddart*, 2 Cr. M. & R. 316 But whatever may have been

formerly the rule, the true doctrine of the common law according to the later authorities is, that an estoppel by record or deed is conclusive as a plea when there is an opportunity to plead it, but when there is no such opportunity it is conclusive as evidence. *Flandreau* v. *Downey*, 23 Cal. 354; 2 Sm. Lead. Cas. (7th Am. ed.) 628. It is also well settled at the common law that an estoppel by matter *in pais* need not be pleaded (*Lyon* v. *Reed*, 13 M. & W. 285; *Sanderson* v. *Collman*, 4 Man. & Gr. 209; *Welland Canal Co.* v. *Hathaway*, 8 Wend. 480); but it is otherwise by statute in some of the States. *Ransom* v. *Stanberry*, 22 Iowa, 334; *Wood* v. *Ostram*, 29 Ind. 177.

In those States where special pleading has been abrogated, and Code forms substituted therefor, it is no longer necessary to plead the estoppel in the common-law form. And whether it may be necessary to plead it in any way, or give notice of it, will depend upon the terms of the statute in the particular State. See Id.; *Etcheborne* v. *Auzerais*, 45 Cal. 121; *Caldwell* v. *Auger*, 4 Minn. 217; *Larum* v. *Wilmer*, 35 Iowa, 244.

# CHAPTER XXIII.

## EVICTION.

### ARTICLE I.

#### GENERAL RULES AND PRINCIPLES.

**Section 1. Definition and nature.** The term "eviction" was formerly used to denote an expulsion from the possession of land, by the assertion of a title paramount, and by process of law. But in the course of time it has come to be applied, popularly at least, to every kind of expulsion or amotion, and is often used by law writers as synonymous with, or as comprehending, disseizin or ouster.

As between landlord and tenant, it implies some act on the part of the former of a grave and permanent character, done with the intention of depriving the tenant of the enjoyment of the demised premises. *Upton* v. *Townend*, 17 C. B. 30.

In the present acceptation of the term, an eviction may be either rightful or wrongful in its character, and either with or without process of law. And the name may, by analogy, be applied to certain cases of dispossession of personal property, with equal propriety as to those affecting real property only.

Of disseizin or ouster sufficient has been said under the titles "Ejectment" (Vol. 3, p. 25), and "Landlord and Tenant" (Vol. 4, pp. 211, 278), and this chapter will treat more particularly of the depriving a vendee, lessee, bailee or purchaser of property, real or personal, of the possession or enjoyment thereof, by the act of the person from whom he derives his rights, or by paramount title.

Eviction from land may be either actual or constructive. It is the former when the vendee or lessee is expelled from, or deprived of the actual possession by process of law, consequent upon a judgment, or by the exercise of the common-law right of entry, or when he voluntarily but actually abandons possession, and surrenders to an adverse title asserted against him. Rawle's Covenants for Title, 241. Thus, an entry by a mortgagee for the purposes of a foreclosure has been held to be an eviction of the mortgagor's grantee, although he was left in

possession. *Tufts* v. *Adams*, 8 Pick. 547; *White* v. *Whitney*, 3 Metc. 81; *Furnas* v. *Durgin*, 119 Mass. 500; S. C., 20 Am. Rep. 341. And one in possession of land under covenants of warranty is not bound to contest a paramount title asserted and threatened to be enforced against him, but may yield to it voluntarily. *Hamilton* v. *Cutts*, 4 Mass. 349; *Sprague* v. *Baker*, 17 id. 586; *Mitchell* v. *Warner*, 5 Conn. 521; *Booth* v. *Starr*, 5 Day, 282. But if he does so, he assumes the risk and the burden of showing such title to be paramount. *Peck* v. *Hensley*, 20 Tex. 673.

It is a constructive eviction when such grantee or lessee, being entitled to be put in possession under his deed or lease, has never had it, nor been able to obtain it, by reason of a paramount adverse title; or when he accepts a lease or other conveyance under an adverse claimant, either before or after a judgment establishing the title of such claimant, and remains in possession, as he may lawfully do if such title is in fact paramount; or when the eviction is not of the land itself, but of something which represents the land, or of some incident to its enjoyment. Rawle's Covenants, etc., 241; *Loomis* v. *Bedel*, 11 N. H. 74; *Turner* v. *Goodrich*, 26 Vt. 709.

## ARTICLE II.

### AS TO REAL ESTATE.

**Section 1. In general.** The ancient rule that covenants of quiet enjoyment and warranty of title might be implied from the terms "give, grant," etc., in a conveyance of land, has to a considerable extent been abrogated by statute or usage in this country, and a grantee who wishes to protect himself against a lack or failure of title in his grantor should see that express covenants on that subject are inserted in his deed.

A covenant for quiet enjoyment relates only to the possession, and any wrongful eviction by the grantor or landlord, or lawful eviction by third parties, is a breach thereof; while a covenant of warranty relates to the title, and an eviction is a breach of that covenant only when it is by paramount title. If either of those covenants be broken, the covenantee has an immediate right of action against the covenantor, which will also avail him as a defense to an action by the latter founded upon the same transaction. *McGary* v. *Hastings*, 39 Cal. 360; S. C., 2 Am. Rep. 456; *Turner* v. *Goodrich*, 26 Vt. 709; *Brady* v. *Spurck*, 27 Ill. 478; *Stewart* v. *Drake*, 4 Halst. (N. J.) 139; *St. John* v. *Palmer*, 5 Hill, 599; *Fowler* v. *Poling*, 6 Barb. 165; *Beebe* v. *Swartwout*, 3

Gilm. (Ill.) 162. But upon this subject see title *Covenants*, Vol. 2, pp. 381–393.

§ 2. **When a defense by a tenant.** In every lease for years there is an implied covenant for quiet enjoyment, if none is expressed; and an eviction which amounts to a breach of that covenant is a good defense to an action for the rent. To constitute an eviction which will suspend the rent, it is not necessary that there should be an actual physical expulsion from any part of the premises; but any act of a permanent character, done by the procurement of the landlord with the intention of depriving the tenant of the enjoyment of the premises demised, or of any part of them, will operate as such. *Upton* v. *Townend*, 17 C. B. 30; 1 Jur. (N. S.) 1089; 25 L. J. C. P. 44; *Morrison* v. *Chadwick*, 7 C. B. 266; 6 D. & L. 567; 13 L. J. C. P. 189; *Salmon* v. *Smith*, 1 Saund. 204, *n.* 2; *Colburn* v. *Morrill*, 117 Mass. 262; S. C., 19 Am. Rep. 415. Such an eviction will suspend the rent, not merely for the part of the premises of which the tenant is dispossessed, but for the whole demised premises, until he is restored to full possession, even though he still retains a part. Thus, if the landlord takes possession of a part of the premises with intent to deprive the tenant of its use and enjoyment, or if, without the tenant's consent, he erects a building upon the premises demised, or even builds a wall under the eaves of the demised building, so that the tenant is thereby deprived of the beneficial use of any part thereof, such act of his will suspend the rent as to the whole premises, and furnish the tenant a good defense to an action for its recovery. *Royce* v. *Guggenheim*, 106 Mass. 201; 8 Am. Rep. 322; *Sherman* v. *Williams*, 113 Mass. 481; 18 Am. Rep. 522; *Leishman* v. *White*, 1 Allen, 489; *Christopher* v. *Austin*, 11 N. Y. (1 Kern.) 216; *People* v. *Gedney*, 10 Hun, 151. Vol. 4, pp. 278, 279.

So, also, if the landlord creates a nuisance near to the premises, or renders them untenantable or less fit for use; or deliberately commits acts which would justify the tenant in quitting the premises, such as bringing lewd women into another part of the same building, and creating nocturnal disturbances in their company; or tearing down a partition between the entrance leading to the tenant's room and a grog-shop, so as to compel persons having business with the tenant to pass through such grog-shop. *Eldred* v. *Leahy*, 31 Wis. 546; *Dyett* v. *Pendleton*, 8 Cow. 727; *Rogers* v. *Ostrom*, 35 Barb. 523. Vol. 4, pp. 235, 279.

An eviction by a third party by virtue of legal process is also a breach of the covenant for quiet enjoyment, and suspends the rent. Washburn on Real Property, 428.

Where a tenant yields the possession of the demised premises, in

pursuance, or in consequence of a judgment for the recovery of possession, to the person adjudged to be the rightful owner of the paramount title, it is an eviction, and he is discharged from the payment of rent. *Home Life Ins. Co.* v. *Sherman*, 46 N. Y. (1 Sick.) 370.

The defense of eviction may be deemed based upon failure of consideration, or upon damages sustained by reason of the wrongful acts or omissions of the landlord, as well as upon breach of covenant; and, under the practice established by the New York and other similar codes, it is immaterial to which it is referred.

§ 3. **When not a defense by a tenant.** Whether the act of the landlord in taking possession of the premises shall be considered an eviction, or a mere trespass, depends upon his intent; and where such act is not of a permanent character, or the intention to deprive the tenant of the enjoyment of the premises as demised is wanting, it is no defense to an action for the rent. *Hayner* v. *Smith*, 63 Ill. 430; S. C., 14 Am. Rep. 124. See, also, *Bennett* v. *Bittle*, 4 Rawle, 339; *Wilson* v. *Smith*, 5 Yerg. (Tenn.) 379. It has been so held, in a case where the landlord put up a fence and by mistake cut off a part of the demised premises, but upon discovery of the mistake offered to remove it. *Mirick* v. *Hoppin*, 118 Mass. 582. And in a case where rooms beneath the demised premises were occupied by another tenant of the same landlord, who was of notoriously bad character, and who used them for purposes of prostitution, causing great disturbance of the tenant above, but there was no evidence that the landlord let such rooms for the purpose of being so used as to disturb that tenant, or that he knew of their being put to such use, or that any evidence thereof was given him, that fact alone was held not to constitute a defense to an action for rent. *De Witt* v. *Pierson*, 112 Mass. 8; S. C., 17 Am. Rep. 58. Nor is it any defense, where the premises are taken according to law by competent municipal authority. *O'Brien* v. *Ball*, 119 Mass. 28.

A landlord may erect a building on a lot adjoining premises demised by him, though it darkens the windows of the building on the lot demised. Such erection is not an eviction of the tenant, though it may be a ground for damages. *Palmer* v. *Wetmore*, 2 Sandf. (N. Y.) 316. And see Vol. 1, pp. 292–297; *Doyle* v. *Lord*, 64 N. Y. (19 Sick.) 432; S. C., 21 Am. Rep. 629.

§ 4. **When a defense to a grantee.** An eviction by paramount title is a breach of the covenant of warranty in a deed, as well as of that for quiet enjoyment, and is a defense to an action for the purchase-money. But the mere existence of a superior title, which has never been enforced, does not amount to such a breach. A grantee, who takes

possession under a warranty deed, giving notes for the purchase-money, cannot resist payment thereof, unless he is disturbed in or expelled from his possession by such a title, though it need not be by legal process. *Laforge* v. *Mathews*, 68 Ill. 328. It is sufficient that he is threatened with eviction by an outstanding paramount title, of which he had no notice at the time of his purchase; or that he has yielded possession to a person asserting such a title; or that the rightful owner, finding the premises vacant, has taken possession. *Price* v. *Blount*, 41 Tex. 472; *St. John* v. *Palmer*, 5 Hill, 599; *Fowler* v. *Poling*, 6 Barb. 165; *Beebe* v. *Swartwout*, 3 Gilm. (Ill.) 162.

It is also a good defense to such an action, that the mortgagee, under a mortgage existing at the date of the deed, has entered and taken legal possession of the premises; or that the covenantor has suffered such a mortgage to be foreclosed, even though the covenantor has himself become the purchaser at the foreclosure sale (*Tufts* v. *Adams*, 8 Pick. 537; *Cowdry* v. *Coit*, 44 N. Y. [5 Hand] 382; S. C., 4 Am. Rep. 690); or, that the land conveyed, with such covenant, has been sold under a prior judgment lien, and the covenantee is liable to be evicted under such sale; or that an officer has delivered seizin thereof to the creditor, in satisfaction of his execution (*Frisbee* v. *Hoffnagee*, 11 Johns. 50; *Bigelow* v. *Jones*, 4 Mass. 512; *Barrett* v. *Porter*, 14 id. 143); or that possession has been taken by another grantee of the same land, under a deed from the same grantor executed subsequent to but recorded before that of such covenantee. *Curtis* v. *Deering*, 12 Me. 499.

If the covenantee submits to an asserted adverse title, and then sets that up as a defense to an action for rent, the burden of proof is upon him to show that such title is paramount to that of his grantor. *Hamilton* v. *Cutts*, 4 Mass. 349. Vol. 4, p. 234.

## ARTICLE III.

### AS TO PERSONAL PROPERTY.

**Section 1. In general.** It is of the essence of a contract for the sale of chattels, that the vendor has a perfect title thereto, and that they are unincumbered, so that the purchaser shall acquire a title which is free and clear. *Dresser* v. *Ainsworth*, 9 Barb. 619. And where a vendor sells property which is in his possession, the law will imply a warranty that he has good title. The English cases seem not to be uniform on this subject, but this rule is well supported there, and has a great weight of authority in its favor in this country. 2 Bla. Com. 451; 3 id.

165; Story on Sales, §§ 367–373; *Simms* v. *Marryatt*, 12 Q. B. 281; *Rew* v. *Barber*, 3 Cow. 272; *Swett* v. *Colgate*, 20 Johns. 196; *Burt* v. *Dewey*, 40 N. Y. (1 Hand) 283; *Coolidge* v. *Brigham*, 1 Metc. 551; *Dorsey* v. *Jackman*, 1 S. & R. 42; *Ricks* v. *Dillahunty*, 8 Port. (Ala.) 133; *Chancellor* v. *Wiggins*, 4 B. Monr. 201; *Gross* v. *Kierski*, 41 Cal. 111. Vol. 5, pp. 560, 561.

If the vendor is out of possession at the time of the sale, and makes no express warranty of title, none will be implied. *McCoy* v. *Artcher*, 3 Barb. 323; *Dresser* v. *Ainsworth*, 9 id. 619; *Edick* v. *Crim*, 10 id. 445; *Scranton* v. *Clark*, 39 N. Y. (12 Tiff.) 220. Though controverted (see Story on Sales, § 367), this distinction seems to be firmly established. 1 Parsons on Contracts, 575; *Huntingdon* v. *Hall*, 36 Me. 501; *Scott* v. *Hix*, 2 Sneed (Tenn.), 192; *Storm* v. *Smith*, 43 Miss. 497. Vol. 5, p. 561.

The vendor of chattels with warranty of title, express or implied, is bound to protect the purchaser in his title; and is answerable to him if the property is taken away from the latter by one who has a better title, whether such vendor knew of the defect in his title or not. See Vol. 5, tit. *Sales*. If notified of a suit against the purchaser in respect to such title, he is bound to defend it, or to indemnify the purchaser. *Brewster* v. *Countryman*, 12 Wend. 446, 450; *Barney* v. *Dewey*, 13 Johns. 224; *Blasdale* v. *Babcock*, 1 id. 517. Such a deprivation of the purchaser's possession of personal property is equivalent to an eviction from real property by title paramount, and confers similar rights.

As in the case of real property, an eviction, though necessary to give the purchaser a right of action or ground of defense, need not be by process of law; but the purchaser may surrender possession to the real owner, and can then maintain an action against his vendor for the breach of warranty; or he may take an assignment of his vendor's right of action against the person from whom he purchased, and sue the latter. *Bordewell* v. *Colie*, 1 Lans. (N. Y.) 141; S. C. affirmed, 45 N. Y. (6 Hand) 494.

A vendee has the right to rescind a contract of sale, and recover back his advances, even upon the discovery of a total failure of the vendor's title, if the contract is executory; but if it is executed, and there was no express affirmation of title, he must wait until his title is attacked. And if the title to a portion of the property fails, and such portion is material to the enjoyment of the rest, or formed a material inducement to the purchase, or if the contract was entire, he may rescind and refuse to receive the remainder. Story on Sales, §§ 407–423; and see Vol. 5, tit. *Sales*. If he has paid the purchase-money, he may recover it back, upon such failure of title.

§ 2. **Eviction of purchaser of personal property, when a defense.** An eviction which will sustain an action by the purchaser against his vendor, will also avail him as a defense to an action for the unpaid purchase-money. Thus, if the true owner of personal property recovers it in an action against one who purchased it from a third party, and the latter had notice of the suit and an opportunity to defend it, such recovery is a conclusive bar to an action by him for the purchase-money. *Barney* v. *Dewey*, 13 Johns. 224.

An eviction by the act of the vendor himself will have the same effect. If he rescinds the contract of sale on account of fraud or non-payment, and reclaims the goods, or even brings an action for that purpose, he cannot maintain an action for the price. *Morris* v. *Rexford*, 18 N. Y. (4 Smith) 552.

Stoppage *in transitu* is usually but a mere exercise of the vendor's common-law right of lien, leaving the title in the purchaser, and is therefore not such an eviction as will protect the latter in an action for the price; but the vendor may still maintain an action therefor, if he is ready to deliver on demand and payment. *Kymer* v. *Suwercropp*, 1 Camp. 109; *Newhall* v. *Vargas*, 15 Me. 314; Vol. 5, tit. *Sales*.

§ 3. **When not a defense.** Mere want of title in the vendor of goods is no defense to an action for the purchase-money, unless the real owner has recovered against the purchaser. *Case* v. *Hall*, 24 Wend. 102; *Sweetman* v. *Prince*, 26 N. Y. (12 Smith) 224; *Burt* v. *Dewey*, 40 N. Y. (1 Hand) 283.

There is no implied warranty upon a sale of chattels by a sheriff, or by an executor, administrator or other trustee; and consequently an eviction by paramount title from personal property, purchased at such a sale, is no defense to an action for the price. *Yates* v. *Bond*, 2 McCord (S. C.), 382; *Davis* v. *Hunt*, 2 Bailey, 412; *Bashore* v. *Whisler*, 3 Watts, 490; *Robinson* v. *Cooper*, 1 Hill (S. C.), 286; *Stone* v. *Pointer*, 5 Munf. 287; *Thayer* v. *Sheriff*, 2 Bay, 169; *Ricks* v. *Dillahunty*, 8 Port. (Ala.) 133; *Mockbee* v. *Gardner*, 2 Harr. & Gil. 176.

§ 4. **How interposed.** The defense of eviction, whether it was caused by the act of the vendor or by paramount title, is substantially one of failure of consideration. Under the common law practice, this defense, or that of want of title in the plaintiff, may be set up as a bar to an action for purchase-money, by a special plea; and this was formerly permitted in New York, even in an action upon a sealed instrument given for such purchase-money. *Case* v. *Boughton*, 11 Wend. 10[illegible]. The code of New York, and those of other States copied from it, would seem to require such a defense to be set out specially in the answer; it being one which avoids by subsequent matter an admitted contract, or

shows that the cause of action has been discharged. Under the code practice, probably the defendant's claim for damages for the eviction or breach of warranty could be set up in the answer as a counter-claim, and recovered in the same action, without resort to an independent or a cross action therefor.

§ 5. **Burden of proof.** A defendant, who sets up an eviction as an affirmative defense, is bound to prove that fact. If such eviction was by suit, and the person from whom he derived title had notice of the suit and an opportunity to defend it, the defendant is not bound to show that the title by which he was evicted was paramount to that under which he himself claims; but if, upon the assertion of the adverse title against him, he voluntarily yielded to it, he thereby assumed the burden of proving such title to be paramount. *Peck* v. *Hensley*, 20 Tex. 673; *Bordewell* v. *Colie*, 1 Lans. 141; 45 N. Y. (6 Hand) 494; and *Sweetman* v. *Prince*, 26 N. Y. (12 Smith) 224.

§ 6. **When a defense for a bailee.** A bailee, put in possession of the personal property of another for some temporary purpose, is bound to exercise a certain degree of care in respect to it, the extent of which is governed to a great extent by the purpose for which it is intrusted to him, and the proportion of benefit to be derived from the bailment as between him and his bailor. But there is one duty which is incumbent upon every bailee; that of returning the property to his bailor at the time fixed, or upon proper demand; and a corresponding liability for damages, if, without a sufficient excuse, he fails so to return it. His receipt of the property from the bailor estops him from denying the title of such bailor; but that estoppel ceases whenever the bailment is determined by what is equivalent to an eviction by title paramount.

As a general rule, it is no defense to a bailee, in an action for a non-delivery, that he has become aware of a superior title in a third person; but there must be something equivalent to an actual eviction by valid legal process. *Shelbury* v. *Scotsford*, Yelv. 23; *Biddle* v. *Bond*, 34 L. J. Q. B. 137; 11 Jur. (N. S.) 425; 13 W. R. 561; 12 L. T. (N. S.) 178; *Nudd* v. *Montanye*, 38 Wis. 511; 20 Am. Rep. 25; *Barnard* v. *Kobbe*, 54 N. Y. 516; *Sheridan* v. *New Quay Co.*, 4 C. B. (N. S.) 618; *Great Western R. R. Co.* v. *McComas*, 33 Ill. 185.

It is a good defense to a bailee, in such an action, that the property has been reclaimed by the true owner, or taken out of his possession by virtue of legal process against his bailor. *Edson* v. *Weston*, 7 Cow. 278; *Huntington* v. *Douglass*, 1 Abb. (N. S.) 385. And if the bailee has been compelled to pay for the property, in an action by the true owner, of which the bailor had notice, he may set up that fact as a defense to an

action by the bailor for the same property. *Cook* v. *Holt*, 48 N. Y. (3 Sick.) 275.

If a thing hired by a bailee is lost or injured by inevitable casualty, or taken from him by irresistible force, without his fault, that will relieve him from liability for its non-return. *Ames* v. *Belden*, 17 Barb. 513.

A carrier is excused for non-delivery when the goods intrusted to him are, without any act, fault, or connivance on his part, seized by virtue of valid legal process, and taken out of his possession, and he may set that up as a defense. *Ohio & Miss. Ry. Co.* v. *Yohe*, 51 Ind. 181; S. C., 19 Am. Rep. 727; *Van Winkle* v. *U. S. Mail Steamship Co.*, 37 Barb. 122; *Burton* v. *Wilkinson*, 18 Vt. 186; *Bliven* v. *Hud. Riv. R. R. Co.*, 36 N. Y. 403; *Western Trans. Co.* v. *Barber*, 56 N. Y. (11 Sick.) 544. Vol. 2, pp. 24, 29.

It is the duty of the carrier, in such a case, to give immediate notice of the seizure to the shipper. But it is no excuse for the carrier if the seizure is by process against a person not the owner of the property (*Barnard* v. *Kobbe*, 3 Daly [N. Y.], 35; 54 N. Y. 516; *Edwards* v. *White Line Trans. Co.*, 104 Mass. 159; S. C., 6 Am. Rep. 213; *Ball* v. *Liney*, 48 N. Y. [3 Sick.] 6; S. C., 8 Am. Rep. 511); nor is a seizure by legal process any excuse, if the goods were by law exempt. *Kiff* v. *Old Colony R. R. Co.*, 117 Mass. 591; S. C., 19 Am. Rep. 429.

A carrier is also excused, if the shipper takes the goods from him by the exercise of his common-law right of stoppage *in transitu*. *Oppenheim* v. *Russell*, 3 Bos. & Pul. 42; *Morley* v. *Hay*, 3 M. & R. 696. And it has also been held a good defense, that the goods were taken from his possession by an armed force, without any negligence or complicity on his part. *Abraham* v. *Nunn*, 42 Ala. 51; *Yale* v. *Oliver*, 21 La. Ann. 454. Vol. 2, pp. 28, 29.

The burden of proof to excuse a non-delivery is upon the carrier. *Chapman* v. *New Orleans, etc., R. R. Co.*, 21 La. Ann. 224.

A warehouseman or a pledgee may set up as a defense, that the goods were feloniously taken from him by a stranger, or even by his own servant, without any negligence on his part; but that will not excuse a borrower.

A pledgee may even submit to a paramount title, when he learns of it, and restore the property to the lawful owner, and then set up the right of such owner as a defense to an action by the pledgor for the recovery of the pledge. *Cheesman* v. *Exall*, 6 Exch. 341. In so doing, he must of course assume the burden of establishing the paramount title of the person to whom he has delivered it. See Vol. 5, p. 180, tit. *Pledge*.

# CHAPTER XXIV.

## EXECUTION.

### ARTICLE I.

#### GENERAL RULES AND PRINCIPLES.

**Section 1. In general.** An execution is a final process issuing out of a court to enforce the payment of a judgment rendered therein in favor of the judgment creditor, against the judgment debtor. It therefore follows as a matter of course that, in order to be operative, it must strictly follow the judgment, both as to the parties and the amount; otherwise it is void and will not operate as a protection to the officer making a levy under it. Thus, where an execution issued for two dollars and forty cents more than the judgment, it was held to be void (*Prescott* v. *Prescott*, 62 Me. 428; *Bradley* v. *Sadler*, 57 Ga. 190); and the same is true where *costs* are included in the execution when the judgment does not include them. *Den* v. *Morse*, 12 N. J. Law, 331. So it must correctly state the time when the judgment was rendered. *Rider* v. *Alexander*, 1 D. Chip. (Vt.) 274.

But it has been held that the mere fact that there is a slight discrepancy, such as the omission of interest in the execution where interest has been given, will not invalidate an execution sale where there is no suggestion that there was any other judgment or execution between the parties. *Brace* v. *Shaw*, 16 B. Monr. (Ky.) 43. It is, however, held in North Carolina, that an execution so issuing is void, and that the purchaser at a sale thereunder acquired no title. *Collais* v. *McLeod*, 8 Ired. (N. C.) L. 221. So in another case where a judgment on a bond was for $2,000, to be satisfied by the payment of $395.44 assessed damage by statute provision, and the execution issued thereon recited a judgment for $395.44, the variance between the judgment and execution was fatal, and a sale under the execution void (*Walker* v. *Marshall*, 7 Ired. [N. C.] L. 1); and upon principle the doctrine of the North Carolina courts would seem to be correct. The enforcement of a judgment by execution and a levy thereunder is an arbitrary proceeding, and has no validity unless it strictly conforms to the

law. It is issued to enforce a judgment and has no validity unless a judgment has been rendered upon which it can issue, and if it misrecites the judgment as to the amount thereof, it cannot stand upon the record; and as parol evidence is not admissible in aid of it, it is not easy to understand how it can be supported as a valid legal instrument. In any event, if such an execution is not absolutely void, it is voidable, and will be quashed upon motion or other proper proceedings. *Criswell* v. *Ragsdale*, 18 Tex. 443; *Bain* v. *Chrisman*, 27 Mo. 293; *Copeley* v. *Bonner*, 7 La. Ann. 578; *Washington* v. *Ewing*, Mart. & Yerg. (Tenn.) 45; *Com.* v. *Fisher*, 2 J. J. Marsh. (Ky.) 137. But where the judgment and execution are the same in legal effect, a mere verbal variance not amounting to a misrecital of the judgment is not material. *Perry* v. *Whipple*, 38 Vt. 278; *Thornton* v. *Lane*, 11 Ga. 459, *Hunter* v. *Miller*, 36 Mo. 143; *Healy* v. *Preston*, 14 How. (N. Y.) 20; *Spratt* v. *Reid*, 3 Iowa, 489; *Montgomery* v. *Farley*, 5 Mo. 233; *Sanders* v. *Kentucky Ins. Co.*, 4 Bibb (Ky.), 471.

In New York, the fact that an execution issues for too much does not render either it or a sale made under it void, but only invalidates the sale, *as to the excess* (*Peck* v. *Tiffany*, 2 N. Y. [2 Comst.] 451); and such also is the rule in California. *Franklin* v. *Merida*, 50 Cal. 289. But it is held in Georgia that such an execution must be amended, and that a previous levy fails. *Bradley* v. *Sadler*, 57 Ga. 191.

A variance between an execution and judgment may be so marked as to raise the inference that the judgment mentioned in the writ is not the judgment upon which the writ issued, but such inference may be rebutted by proof; and if it appears that in fact the judgment in question is the one upon which the writ was issued, the variance, though an irregularity, does not render the writ void. *Corbin* v. *Pearce*, 81 Ill. 461. And in order to be rendered invalid by reason of a variance, the variance must be material. That is, it must be of such a character that the execution is not supported by the record of the judgment on which it was issued. *Corbin* v. *Pearce*, 81 Ill. 461. See, also, *Perry* v. *Whipple*, 38 Vt. 278; *Hunter* v. *Miller*, 36 Mo. 143; *Thornton* v. *Lane*, 11 Ga. 459. Thus, if a judgment is rendered agains heirs for lands descended to them, and the execution is issued against "the goods, chattels, lands and tenements" of the heirs, the execution is invalid because there is no judgment to support it. *Walker* v. *Marshall*, 7 Ired. (N. C.) L. 1. So where the execution recites a judgment as of a different term from that which appears of record, it is irregular and void. *Rider* v. *Alexander*, 1 D. Chip. (Vt.) 274. But where an execution does not misrecite the judgment, but does not in all respects properly describe it, yet if there is in the execution enough

stated so that the defect can be supplied by inference, it is not irregular. Thus, where an execution simply stated the rendition of a judgment between two parties, but did not designate in whose favor it was rendered, but it was signed by one of the attorneys of record for the plaintiff, it was held that from these facts it might properly be inferred that the defendant in the action was the judgment debtor referred to. *Morrison* v. *Austin*, 14 Wis. 601. So where an execution was dated Oct. 21st, 1873, and recited that judgment was rendered at the term held "on the first Monday of September last, to wit on the fourteenth day of Oct., 187–," it was held that there was enough on the face of the execution to show that the judgment was recovered on the 21st day of Oct., 1873. *Stevens* v. *Roberts*, 121 Mass. 555.

The execution must properly describe the judgment and follow it as to parties, therefore, where the judgment is against several joint judgment debtors, the execution must issue against all of them, although after judgment was rendered, but before execution is issued, one of them has been discharged as a bankrupt. The remedy of the bankrupt debtor is to apply for a stay of execution as to his property. *Linn* v. *Hamilton*, 34 N. J. Law, 305.

When the judgment is *in rem*, the execution must issue *in rem*. Thus, where a judgment is entered against a firm on a note, with a warrant of attorney to confess judgment, not under seal, signed by one of the firm only, in the name of the firm for a firm debt, it was held that the plaintiff was entitled to an execution against the firm effects, but not against the other members of the firm. *Kneib* v. *Graves*, 72 Penn. St. 104.

Where the plaintiff in an action dies pending an appeal from a judgment, an execution issued in his name is void. But it may be amended upon motion, but not *nunc pro tunc*, if the rights of third persons will be prejudiced thereby (*Allen* v. *Thrall*, cited in 41 Vt. 79; *Williams* v. *Sharpe*, 70 N. C. 582); and if one or more of several defendants die after judgment, the execution can issue only against the survivors. *Sheetz* v. *Wynkoop*, 74 Penn. St. 198. Where a judgment is obtained against the personal property of a deceased debtor, an execution issued against his executor or administrator merely describing them in their representative capacity, is irregular. *Olmsted* v. *Vredenburgh*, 10 How. (N. Y.) 215. But if a decree or judgment is against an executor or administrator for the absolute payment of money, the execution should command a levy upon his property. *Davies* v. *Skidmore*, 5 Hill (N. Y.), 501.

Where a judgment is against A and B, but the execution only recites a judgment against B, it is no protection to an officer who levies it upon

the property of A, although he is therein directed to do so, because upon its face it shows that there is no judgment against A upon which it could issue. *Wilton Town Co.* v. *Humphrey*, 15 Kans. 372. Where the judgment is against a person in a representative capacity, the fact that the execution issues against him in this form, "A, administrator, etc.," without stating that it is intended to operate as an execution against "A *as* administrator, etc." is valid, because upon its face it is evident that it issues against him in his representative and not in his individual capacity (*Fry* v. *Shehee*, 55 Ga. 208); and an officer would not be justified in levying such an execution upon the individual property of A. *Olmsted* v. *Vredenburgh*, 10 How. (N. Y.) 215. Where, however, from the entire record, it is doubtful whether the judgment is against a person in his representative capacity or against his principal, a levy upon the property of the principal will not be set aside or held invalid, if there is enough in the record to warrant an inference that the judgment was intended to operate against the principal.

Thus, where an officer acting under an execution which read as follows, "You are commanded to take into your possession enough of the personal property of The Wilton Town Company to satisfy a judgment of two dollars and fifty-five cents, together with all costs that have or may accrue in a case wherein H. was plaintiff, and N. and B., *officers of the W. T. Co.*, defendants, rendered this 20th day of February, 1874, etc.," levied upon property of the said W. T. Co., and where it was doubtful, from the whole record, whether the proceedings and judgment in the action in which the execution issued were not in fact prosecuted against the W. T. Co., and the execution failed to show against whom the judgment was in fact rendered, it was held that the officer was protected by the execution, and that the W. T. Co. could not recover the property from him in replevin. *Wilton Town Co.* v. *Humphrey*, 15 Kans. 372. The statutory provisions in reference to the issue of executions should be strictly complied with, and any material failure in that respect invalidates the writ. Thus, where the statute requires the writ to be issued under the seal of the court, it must be so issued or it is invalid on its face, and affords no protection to an officer acting under it (*King* v. *Baker*, 7 La. Ann. 571), and confers no title upon a person purchasing property sold under it. *Ins. Co.* v. *Hallock*, 6 Wall. 556. But where the statute requires that an execution shall only be issued by order of court, the issue of the writ under the seal of the court is sufficient evidence that it was issued by its order. *Bryant* v. *Johnson*, 24 Me. 304.

Where the statute provides that execution shall be issued by the *clerk* of the court, no other person has authority to issue it, and an ex-

ecution signed and issued by the judge is invalid and void upon its face. *Blount* v. *Wells*, 55 Ga. 282; *Hernandez* v. *Drake*, 81 Ill. 34.

But in New York it has been held that an execution issuing out of the county court and signed by the plaintiff's attorney, even if void under the code, because not signed by the clerk, will, if nothing appears therein to notify the sheriff that it was issued upon the transcript of a justice's judgment, protect him in levying upon and holding the property of the judgment debtor (*Hill* v. *Haynes*, 54 N. Y. [9 Sick.] 153), and a similar rule prevails in the United States court. *Griswold* v. *Connolly*, 1 Wood (C. C.), 193. But, even where an execution is regular upon its face, it has been held that if the sheriff has notice or knowledge of facts *aliunde*, that render it void, he is not protected by it. *Hill* v. *Haynes*, 54 N. Y. (9 Sick.) 153; *Grace* v. *Mitchell*, 31 Wis. 533; 11 Am. Rep. 613. Where, however, an execution is merely irregular, and not void *if valid on its face*, it will be a full protection to the sheriff, although he had notice of the irregularity. *McGuinty* v. *Herrick*, 5 Wend. 240; *Ringo* v. *Ward*, 2 B. Monr. (Ky.) 127; *Gott* v. *Mitchell*, 7 Blackf. 270.

The time within which executions may be issued is fixed by statute, and must be complied with strictly (*Bacon* v. *Cropsey*, 7 N. Y. 195; *Dewing* v. *Durant*, 10 Gray, 29; *Harris* v. *Wetmore*, 5 Ga. 64; *Bryan* v. *Comly*, 2 Miles [Penn.], 271); and cannot issue under any circumstances until a judgment has been rendered upon which it can be predicated (*Parker* v. *Frambes*, 2 N. J. Law, 115; *Marvin* v. *Herrick*, 5 Wend. 109; *Barrie* v. *Dana*, 20 Johns. 307); and, if an execution is issued before the time within which by statute it may issue, without special leave of court, when that power is accorded to the court, it is irregular and will be set aside. *Bobyshall* v. *Oppenheimer*, 4 Wash. (C. C.) 388; *Dodge* v. *Chandler*, 9 Minn. 97; *Teall* v. *Van Wyck*, 10 Barb. 376. But it seems that unless execution is stayed the fact that an appeal is pending will not prevent its issue. *Howard* v. *Burlington*, 35 Vt. 491. But a judgment upon one issue, when there is still another issue to be disposed of, will not uphold an execution (*Beale* v. *Buchanan*, 9 Penn. St. 123); nor can an execution issue upon an interlocutory judgment, until the amount has been fixed by the court (*Daniel* v. *Cooper*, 2 Houst. [Del.] 506); nor can one execution be issued upon two separate judgments. *Doe* v. *Rue*, 4 Blackf. 263.

Where the statute provides the time within which an execution shall be made returnable, if it is made returnable at a later period, it is irregular and will be set aside on motion of the defendant (*Stretter* v. *Fisher*, 3 How. [N. Y.] 67); and affords no protection to an officer

proceeding under it, as he is presumed to know the law relative to the time of its return, and has notice of its invalidity upon the face of the execution. *Fifield* v. *Richardson*, 34 Vt. 410; *Bond* v. *Wilder*, 16 id. 393. But this will depend upon the language of the statute, and in most of the States this irregularity is held to only render the execution *voidable*, at the election of the defendant. *Lehr* v. *Doe*, 3 Sm. & M. 468; *Berry* v. *Riley*, 2 Barb. 307; *Milburn* v. *State*, 11 Mo. 188; *Brown* v. *Hurt*, 31 Ala. 146. But in all of them it is held to be such an irregularity as entitles the defendant to have the execution quashed, if he so elects. *Berry* v. *Riley*, 2 Barb. 307; *Milburn* v. *State*, 11 Mo. 188.

At common law an execution issued in the name of a plaintiff who died before the execution is void, and a sale made under it conveys no title. *People* v. *Bradley*, 17 Ill. 485; *Stewart* v. *Nuckols*, 15 Ala. 225; *Trail* v. *Snouffer*, 6 Md. 308; *Bellinger* v. *Ford*, 21 Barb. 311. But as to the rights of a purchaser under such a sale, see *Wilson* v. *Campbell*, 33 Ala. 249, where it was held that in ejectment against a purchaser on execution, the execution, if regular on its face, was admissible for him, although its validity is controverted on the ground of the plaintiff's death before it issued. But if the fact of the plaintiff's death is thus established, the purchaser takes nothing under the execution. Neither can an execution issue upon a judgment after the death of the defendant (*Cadmus* v. *Jackson*, 52 Penn. St. 295; *Thompson* v. *Ross*, 26 Miss. 198; *Collier* v. *Windham*, 27 Ala. 291; *Doan* v. *Lisle*, 19 Mo. 650; *McMahon* v. *Glasscock*, 5 Yerg. [Tenn.] 304); and even though execution issued before his death, and a levy had been made and the property advertised for sale, his death abates the execution and the sale falls, unless provision is made to the contrary by statute. *Holeman* v. *Holeman*, 2 Bush (Ky.), 514. In New York, under such circumstances, it is held that the execution remains valid, and that the sale is regular (*Becker* v. *Becker*, 47 Barb. 497; *Flanagan* v. *Tinen*, 53 id. 587); and so in Tennessee. *Gregory* v. *Chadwell*, 3 Cold. 390. So, in South Carolina (*Fox* v. *Lamar*, 2 Brev. 217); and in Pennsylvania it is held that an execution issued against a deceased judgment debtor is not void, but only *voidable* (*Speer* v. *Sample*, 4 Watts, 367); and the same is held in New Hampshire. *Butler* v. *Haynes*, 3 N. H. 21. Where there are two or more judgment debtors, an execution may issue against the survivor. *Wade* v. *Watt*, 41 Miss. 248; *Woodcock* v. *Bennett*, 1 Cow. 711; *Thompson* v. *Bondurant*, 15 Ala. 346. Of course an execution issued upon a void judgment is void (*Albee* v. *Ward*, 8 Mass. 79; *Corbin* v. *Pearce*, 81 Ill. 461); and an execution issued when there is no judgment upon which it is predicated, is a mere nullity. *Nabours*

v. *Cocke*, 24 Miss. 44. Unless execution is issued within the period provided by statute, or is kept on foot in the manner provided by statute, none can issue until the judgment has been revived by *scire facias* or such other process or method as is provided by statute. *Bracken* v. *Wood*, 12 Ark. 605; *Reeves* v. *Burnham*, 4 Miss. 25; *Shapard* v. *Bailleul*, 3 Tex. 26; *Van Cleave* v. *Haworth*, 5 Ala. 188.

But it is generally held, that an execution issued after the period provided by statute, is not void, but merely voidable, and that a levy made under it cannot be collaterally attacked. The error is held to be one that the debtor can waive (*Willard* v. *Whipple*, 40 Vt. 219; *Ingram* v. *Belk*, 2 Strobh. [S. C.] 207; *Bannan* v. *Rathbone*, 3 Grant's Cas. [Pa.] 259; *Corson* v. *Walker*, 16 Mo. 68), and it is held that the sheriff is bound to obey it. *Mariner* v. *Coon*, 16 Wis. 465; *Dawson* v. *Shepherd*, 4 Dev. (N. C.) 497. But in Georgia, *Welch* v. *Butler*, 24 Ga. 445, and in Texas, such executions and sales under them are treated as void (*North* v. *Swing*, 24 Tex. 193), and in all cases an execution issued on a dormant judgment would doubtless be treated as fraudulent against a *bona fide* purchaser, subsequent to the expiration of the limitation. *Ball* v. *Shell*, 21 Wend. 222; *Sage* v. *Woodin*, 66 N. Y. (21 Sick.) 578, 584. Where, however, the judgment creditor has been prevented from taking out execution by a stay (*Porter* v. *Vaughn*, 24 Vt. 211), or by an injunction (*Gibbes* v. *Mitchell*, 2 Bay [S. C.], 120), there need be no *scire facias* until a year and a day after the impediment to the issue of the execution is removed. By the common law an execution cannot issue after a year and a day from the time when by law it might have issued, but the judgment must be revived by *scire facias*. The statutes of the several States, generally make provisions for the issue of *alias* executions, and where provision is so made, the statutory provisions must be complied with. In reference to the *time* for the issuing of executions, the form, return, mode of issuing, and as to *alias*, *plus* and *pluries* executions, the statute of each State should be consulted.

Even though the judgment is erroneous, the execution is not irregular, and a party may justify under it. *Jackson* v. *Pratt*, 10 Johns. 381; *Read* v. *Markle*, 3 id. 523; *Bank of the United States* v. *The Bank of Washington*, 6 Pet. (U. S.) 8. So, where a judgment is payable by installments, an execution erroneously issued for whole sum is merely irregular, and is good for the part due (*State* v. *Platt*, 5 Harr. [Del.] 429); and a mere irregularity can only be taken advantage of by the judgment debtor. *Lowry* v. *Walker*, 4 Vt. 80; *Allen* v. *Portland Stage Co.*, 8 Me. 207; *Commonwealth* v. *Lelar*, 13 Penn. St. 22; *Earle* v. *Thomas*, 14 Tex. 583; *Elliott* v. *Knott*, 14 Md. 121.

But any one interested may avail themselves of a defect that renders an execution absolutely void, as where an execution is altered after its issue in a material part. *White* v. *Jones*, 38 Ill. 159; *People* v. *Lamborn*, 2 id. 123. And, in fact, a stranger to the writ can never take advantage of a defect that is amendable on motion (*Oakley* v. *Becker*, 2 Cow. 454; *Abels* v. *Westervelt*, 15 Abb. Pr. [N. Y.] 230); and even though the defects in an execution, which are merely formal, are such that it must be abated, quashed or set aside as irregular, upon proper motion by the judgment debtor, but which are not such as render it absolutely void will not justify an officer in refusing to execute it. *Chase* v. *Plymouth*, 20 Vt. 469; *Bank of Whitehall* v. *Peters*, 13 id. 395. But where the execution is void, as where it is issued by a court other than that in which the judgment was rendered, without warrant of law (*Clarke* v. *Miller*, 18 Barb. 269); or where there is no judgment to sustain it (*Nabours* v. *Cocke*, 24 Miss. 44); and indeed, in all cases where there is a defect either in the judgment or execution that renders the writ void, the sheriff may properly refuse to serve it. *Grace* v. *Mitchell*, 31 Wis. 533; 11 Am. Rep. 613.

An execution, or even the judgment upon which it is issued, may be amended upon application of the plaintiff therein, by the court issuing the same, unless the defect is such as to render it absolutely void. *Owen* v. *Simpson*, 3 Watts (Penn.), 87; *Hubbert* v. *McCollum*, 6 Ala. 221; *Deloach* v. *State Bank*, 27 id. 437; *Graham* v. *Lynn*, 4 B. Monr. 17. But where the execution is a nullity, it is not amendable. Thus, where an execution was issued by the supreme court upon a judgment rendered in a court of common pleas, there being no statutory provision therefor, it was held not to be amendable, even by the court of common pleas. *Clarke* v. *Miller*, 18 Barb. 269; *Oakley* v. *Becker*, 2 Cow. 454. Neither will an execution be amended, when the rights of third persons have intervened and will be prejudiced thereby. *Williams* v. *Sharpe*, 70 N. C. 582; *Allen* v. *Thrall*, cited in 41 Vt. 79.

Thus, in the latter case the plaintiff in the execution procured a writ of attachment against the defendant upon which the defendant's property was attached by the sheriff, and he took a receipt therefor. A judgment against the defendant was obtained, and pending an appeal therefrom, the plaintiff died, and the judgment being affirmed in the supreme court, the clerk erroneously issued an execution in the plaintiff's name, which was delivered to the sheriff. Under the statute, in order to charge property upon execution, attached upon the original writ, the execution must be issued within thirty days from the time

when by law it might issue, and be placed in the hands of the sheriff or other officer having authority to serve it. After more than thirty days from the date of the execution, the defect therein was discovered, but the lien acquired by the attachment was lost, and the property was not where it could be levied upon by the sheriff, and the receiptor was insolvent, and the court held that the execution could not be amended as of the day of its issue, as the rights of the sheriff would be prejudiced thereby. See *Smith* v. *Howard*, 41 Vt. 74.

§ 2. **As to the person.** Imprisonment for debt, and in civil actions generally, has been abolished in most of the States, except under certain circumstances and conditions provided by the statute, and in those cases the condition under which an arrest may be made, is provided by the statutes, and must, in all respects, be literally complied with. *Matter of Smith*, 16 Ill. 347; *Carpentier* v. *Willet*, 6 Bosw. (N. Y.) 25. If an order of arrest is required, the plaintiff must procure the same in the mode prescribed, and must show that there is a good ground therefor within the provisions of the statute, otherwise it will be vacated on motion. *Hall* v. *Munger*, 5 Lans. (N. Y.) 100; *Moller* v. *Aznar*, 11 Abb. (N. S.) 233; *Mason* v. *Lambert*, 3 Daly (N. Y.), 250. If an affidavit is required to be filed with the authority issuing the writ setting forth certain facts, the affidavit must be sufficient in all respects and must be filed with the authority issuing the writ, according to the exact requirements of the statute or the plaintiff will be liable to the debtor for false imprisonment. Thus, where the statute provided that an affidavit setting forth certain facts should be *filed* with the magistrate before the writ issues, it was held that merely slipping it under the door of the magistrate's office, the door being locked and no one in the office at the time, was not a filing within the meaning of the statute, and the defendant having been arrested upon the writ, the plaintiff therein was held chargeable for false imprisonment. *Whitcomb* v. *Cook*, 39 Vt. 585.

Without pursuing this matter further it may be stated generally, that in all cases where imprisonment for debt, etc., is prohibited by statute except in certain cases, the statutory requirements, which are conditions precedent to the right to arrest, must be strictly complied with or the process is not only abatable, but the plaintiff therein will also be liable for false imprisonment. *Whitcomb* v. *Cook*, 39 Vt. 585.

But, where an affidavit is required, an order of arrest predicated upon it is not erroneous if there is any evidence contained therein, however slight, to support the statutory requisites. *Johnson* v. *Maxon*, 23 Mich. 129. In many of the States, exemption from arrest only extends to actions *ex contractu*, and the defendant in an action *ex*

*delicto* may be arrested upon the original writ or upon execution, if the plaintiff so elects, except in those States where the original writ can only issue as a writ of summons, in which case the execution issues as a *capias*. This includes actions of trover, trespass, case, and all actions in which the right of recovery depends upon a wrong committed by the defendant. *Masten* v. *Scovill*, 6 How. (N. Y.) 315. When the original writ properly issues as a *capias* the execution may also be so issued as a matter of course, unless provision is otherwise made by statute (*Davis* v. *Dorr*, 30 Vt. 97; *Purchase* v. *Bellows*, 23 How. [N. Y.] 421), or, unless the *capias* has previously been discharged. *Stelle* v. *Palmer*, 11 Abb. Pr. (N. Y.) 62. By the common law, when the body of a debtor is taken upon execution, the debt is satisfied both at law and in equity (*Horn* v. *Horn*, Amb. 79; *Ex parte Knowell*, 13 Ves. Jr. 193), at least so long as the imprisonment continues (*Sunderland* v. *Loder*, 5 Wend. 58; *Hamilton* v. *Bredeman*, 12 Rich. [S. C.] 464), and during such imprisonment all other legal remedies are suspended (*Hamilton* v. *Bredeman*, id.), and all liens previously acquired are lost, and his subsequent discharge even by the plaintiff, does not revive any lien created by the original attachment. *Willard* v. *Lull*, 20 Vt. 373. Indeed, unless otherwise provided, the imprisonment of the debtor upon execution *prima facie*, operates as a discharge of the debt (*Cooper* v. *Bigalow*, 1 Cow. 56; *Miller* v. *Miller*, 25 Me. 110), and if the debtor is discharged from custody by the plaintiff, he cannot be retaken upon another execution issued upon the same judgment (*Little* v. *Newburyport Bank*, 14 Mass. 443), and if there are two or more joint execution debtors, the discharge of one, by the plaintiff, operates as a discharge of all as to that judgment, so that neither can be taken upon execution issuing thereon again. *Ransom* v. *Keyes*, 9 Cow. 128; *Bailey* v. *Kimbal*, 1 D. Chip. (Vt.) 151. Though in most of the States the common-law rule has been changed by statute. *Eggart* v. *Barnstine*, 3 McCord (S. C.), 162; *Meech* v. *Loomis*, 23 How. (N. Y.) 484; *Martin* v. *Kilbourne*, 11 Vt. 93. But, when a debtor is discharged from arrest upon the ground that the execution was irregular (*McCormick* v. *Melton*, 1 C. M. & R. 525), or for any legal defect in the process, or because of any irregularity on the part of the officer arresting him (*Plomer* v. *Ball*, 5 Ad. & El. 823), he may be retaken upon a fresh writ. *Collins* v. *Beaumont*, 2 P. & D. 363; *Saunders* v. *McCool*, 1 Strobh. (S. C.) 22. So, if the debtor escapes (*Munson* v. *Hill*, 2 Root, 324), or is illegally discharged by the sheriff (*Freeman* v. *Smith*, 7 Ind. 582), or by a void order of court (*Ginochio* v. *Figari*, 4 E. D. Smith [N. Y.], 227), he may be arrested upon a second execution issuing upon the same judgment. Id.

*Fawkes* v. *Davison*, 8 Leigh (Va.), 554. In reference to executions against the body of the debtor, and the effect of his arrest thereon, or discharge therefrom, the statute should be consulted, as the common-law rules have been largely modified thereby.

§ 3. **As to real property.** Any property which an execution debtor has, whether real or personal, under the statutes of the several States, is liable to be taken in satisfaction of the execution, unless exempted therefrom by the statute itself. But by the common law, title to real estate could not be acquired under an execution. Under the statute of Westminster the Second, however, an *elegit* might be prayed out, under which one-half of the debtor's land could be taken and held by the creditor until the debt was fully discharged by the rents. But in this country, in all the States, provision is made by statute for the taking of real estate upon execution, and providing the method of taking it. In some of the States the land may be sold at public auction to the highest bidder, by the sheriff, while in others enough of the land is set off by the sheriff, with the aid of appraisers, to satisfy the execution and costs, and, if it is not redeemed by the debtor or some person claiming under him, within the period provided by statute, the title to the land becomes absolutely vested in the judgment creditor. The levy must be made as provided by the statute, and any material failure in that respect is fatal to its validity (*McBurnie* v. *Overstreet*, 8 B. Monr. [Ky.] 300; *Stevens* v. *Bachelder*, 28 Me. 218; *Collins* v. *Steel*, 4 Harr. [Del.] 536; *Emmons* v. *Williams*, 28 Tex. 776), as, where the statutory requirement, as to demand and notice to the execution debtor, have not been complied with (*McBurnie* v. *Overstreet*, 8 B. Monr. 300), or, where land is *sold* by the sheriff, when the statute only provides for its being set off (*Emmons* v. *Williams*, 28 Tex. 776), or where the property has not been advertised as required by law (*Hayden* v. *Dunlap*, 3 Bibb [Ky.], 216), or is sold before the hour at which it was advertised to be sold (*Williams* v. *Jones*, 1 Bush [Ky.], 621), or upon a day previous thereto (*King* v. *Cushman*, 41 Ill. 31), or where the land sold does not correspond with the order of seizure (*Landreaux* v. *Foley*, 13 La. Ann. 114), or where the sale is made without appraisement, when the statute provides that an appraisal shall be made (*Tyler* v. *Wilkerson*, 27 Ind. 450), or where there is no order of court for the issue of the process, when such order with notice to the defendant is required by statute (*Kintz* v. *Long*, 30 Penn. St. 501), and, generally, it may be said that a levy upon real estate is invalid if any statutory provision in reference thereto is omitted. Id.; *Heydrick* v. *Eaton*, 2 Binn. 215; *Cox* v. *Joiner*, 4 Bibb, 94; *French* v. *Edwards*, 13 Wall. 506; *Maple* v. *Nelson*, 31 Iowa, 322; *Pickering* v. *Reynolds*, 111 Mass. 83; *Haskell* v. *Varina*, id. 84.

Thus, where the statute requires that the land shall be appraised, and that the debtor shall be notified that he may choose an appraiser, the sheriff must not only comply with this provision, but his return must also show a compliance therewith (*Shields* v. *Hastings*, 10 Cush. 247; *Harriman* v. *Cummings*, 45 Me. 351; *Allen* v. *Thayer*, 17 Mass. 299); or the levy is void. So, when the statute requires that the appraisers shall be freeholders, the appointment of one who is not a freeholder invalidates the levy, even though he was agreed upon by the parties, as the parties cannot set aside the statute. *Chapman* v. *Griffin*, 1 Root (Conn.), 196. So, where the officer's return does not show that he notified the debtor, as required by law, to appear and choose appraisers (*Shields* v. *Hastings*, 10 Cush. 247; *Harriman* v. *Cummings*, 45 Me. 351); or by whom the appraisers were appointed (*Allen* v. *Thayer*, 17 Mass. 299); and why they were appointed by one other than the debtor. *Parish* v. *Harriman*, 3 N. H. 317; *Odiorne* v. *Mason*, 9 id. 24; *Allen* v. *Thayer*, 17 Mass. 299.

So, where the statute requires that the appraisers shall be disinterested persons, the officer's return must show that they were so, or the levy is void. *Fox* v. *Hills*, 1 Conn. 295; *Wolcott* v. *Ely*, 2 Allen, 338. So, where the statute requires that the appraisers shall be freeholders, residents of the town, the levy is void if a resident of another town is appointed. *Richmond* v. *Marston*, 15 Ind. 134. So, where the statute requires that the appraisers shall be sworn, the levy is void if they were not sworn, or if the officer's return does not state that they were sworn. *Tweedy* v. *Picket*, 1 Day (Conn.), 109; *Killenberger* v. *Sturtevant*, 11 Cush. 160. So, where no such notice of the sale was given as required by the statute, the levy and sale are void. *Burton* v. *Wolfe*, 4 Harr. (Del.) 221; *Lafferty* v. *Conn*, 3 Sneed, 221; *Austin* v. *Soule*, 36 Vt. 645; *Koehler* v. *Ball*, 2 Kans. 160; *Derry Bank* v. *Webster*, 44 N. H. 264. But a different rule prevails where the statute as to notice is merely directory and not imperative, and in the former case, a failure to give notice of the sale as provided by statute will not invalidate the sale, unless such failure was through fraud, of which the purchaser had notice. *Jones* v. *Planters' Bank*, 3 Humph. 76; *Meanor* v. *Hamilton*, 27 Penn. St. 137; *Lawrence* v. *Speed*, 2 Bibb, 401; *Natchez* v. *Minor*, 10 Sm. & M. 246; *Hobein* v. *Murphy*, 20 Mo. 447. But where the statute is imperative, it must be fully complied with (*In re Wallace*, 2 Pittsb. [Penn.] 145); as, where the notice is required to be given by advertisement in a certain newspaper for a certain number of weeks (*Herrick* v. *Graves*, 16 Wis. 157; *Olcott* v. *Robinson*, 21 N. Y. 150; *Mapp* v. *Thompson*, 9 Ga. 42; *Fitch* v. *Dunlap*, 2 Ohio, 78; *Copley* v. *Robertson*, 6 La. Ann. 181); and must comply with the

statute as to the length of notice. *In re Wallace*, 2 Pittsb. (Penn.) 145.

So, where the statute requires that the property shall be sold at a certain place, a sale at any other place is void (*Kock* v. *Bridges*, 45 Miss. 247); or where the statute requires that the land shall be sold in parcels, and it is sold in bulk (*French* v. *Edwards*, 13 Wall. 506); so, where the sale is made in a less time than that fixed by law (*State* v. *Byrd*, 42 Ga. 629); and generally, it may be said that, in the sale or setting off of real estate upon execution, the sheriff or other officer acts by virtue of statutory authority, and in order to render his proceedings valid, the statutory authority must be strictly pursued. Therefore, the statute under which he acted should be consulted in a given case, in order to ascertain whether a sale or set-off by him is valid. *Howe* v. *Starkweather*, 17 Mass. 240; *Husted* v. *Dakin*, 17 Abb. Pr. (N. Y.) 137; *Ricks* v. *Bernstein*, 19 La. Ann. 141; *Fenno* v. *Coulter*, 14 Ark. 38.

So the levy of an execution upon land has been held invalid where the execution bears date prior to the judgment, or the sale was made subsequent to the time limited for the return (*Sims* v. *Randal*, 1 Brev. [S. C.] 226; *Rogers* v. *Cawood*, 1 Swan [Tenn.], 142); so where a sale is made under an execution that exceeds the amount of the judgment, unless the excess is so small that the maxim *de minimis, etc.*, applies (*Hastings* v. *Johnson*, 1 Nev. 613); or where the judgment upon which the execution is based is void (*Sanders* v. *Rains*, 10 Mo. 770); so where an execution is levied upon a whole tract of land, when a part of it has been conveyed to third persons (*Henry* v. *Mitchell*, 32 Mo. 512); or where more land is sold or set off than is sufficient to pay the debt (*French* v. *Edwards*, 13 Wall. 506; *Boyd* v. *Page*, 30 Me. 460); even by one dollar (*Webster* v. *Hill*, 38 Me. 78); but where the excess was only five dollars the sale was held valid (*Morrison* v. *Bruce*, 9 Dana, 211); and so where the excess is so small as to come under the maxim *de minimis non curat lex*, as, where the excess was only one cent and three mills. *Dwinel* v. *Soper*, 32 Me. 119; *Avery* v. *Bowman*, 40 N. H. 453; *Grosvenor* v. *Chesley*, 48 Me. 369. But in Massachusetts an excess of five dollars and eighty-nine cents was held fatal. *Chenery* v. *Stevens*, 97 Mass. 77.

So where the land is incumbered and the debtor's interest only a moiety of the whole, and the levy is upon the defendant's moiety unincumbered (*Fish* v. *Sawyer*, 11 Conn. 545; *Howe* v. *Blanden*, 21 Vt. 315); or where the debtor's interest is that of tenant in common, and the levy is made by metes and bounds upon the whole land. *Starr* v. *Leavitt*, 2 Conn. 243. It is the duty of the levying officer to desig-

nate the nature of the right upon which he levied, and which he offers for sale, and failing to do so, the sale is invalid. *Wickliffe* v. *Bascom*, 7 B. Monr. 681. So the sheriff should sell to the highest bidder, and if he refuses to accept a bid for a greater sum, and sells the land to a lower bidder, the sale is void. The fact that the bidder is irresponsible will not of itself, justify him in refusing to accept his bid, he must take the bid, and if the bidder will not pay, he should set the property up and sell it again. *Cummings* v. *MacGill*, 2 Murph. 357; *Downing* v. *Brown*, Hard. (Ky.) 189. But in Indiana it is held that he is not bound to accept a bid from an irresponsible person. *Hobbs* v. *Beavers*, 2 Ind. 142. But this is hardly a safe rule, as an irresponsible person may be acting for another in good faith and with the ability to pay. The sheriff is bound to sell the property to the best advantage of the debtor, and where he has levied upon several distinct parcels of land, he must sell them separately, or the sale will be set aside. *Cowen* v. *Underwood*, 16 Ill. 22; *Penn* v. *Craig*, 2 N. J. Eq. 495; *Nesbitt* v. *Dallam*, 7 G. & J. (Md.) 494; *Garrett* v. *Moss*, 20 Ill. 549; *Woods* v. *Monell*, 1 Johns. Ch. 502; *Taylor* v. *Graham*, 18 La. Ann. 656; *Phelps* v. *Conover*, 25 Ill. 309; *French* v. *Edwards*, 13 Wall. 506. But where the land is in a single tract, he is not bound to divide it into parcels, although he may do so if, in his judgment, it will sell to better advantage. *Prather* v. *Hill*, 36 Ill. 402; *Smith* v. *Randall*, 6 Cal. 47.

So it is held that even where the land is in parcels, it may be sold in gross, with the debtor's consent. But this is probably only the case where there are no other persons having an interest in the debtor's interest, as subsequent attaching creditors, etc. *Williamson* v. *Logan*, 1 B. Monr. 237; *Rector* v. *Hartt*, 8 Mo. 448. But, unless the statute expressly requires such sale to be in parcels, a sale in gross is merely irregular and is valid unless set aside by the courts. *Griswold* v. *Stoughton*, 2 Oreg. 61; *Husted* v. *Dakin*, 17 Abb. Pr. (N. Y.) 137; *Harrison* v. *Britton*, 2 Yeates (Penn.), 518. See *Vilas* v. *Reynolds*, 6 Wis. 214.

A sale of unincumbered land, as incumbered, is void (*Tufts* v. *Hayes*, 31 N. H. 138; *Pillsbury* v. *Smyth*, 25 Me. 427; *Brown* v. *Snell*, 46 Me. 490), so a sale of *two* equities of redemption for one entire sum, under a statute authorizing a sale of an equity of redemption in lands, is void whether so provided by statute or not. *Smith* v. *Dow*, 51 Me. 21.

A sale of land under execution is void when there is no such judgment as the execution describes (*Criswell* v. *Ragsdale*, 18 Tex. 443); or when the execution is issued by a court having no power to issue it (*Lee* v. *Newkirk*, 18 Ill. 550); or when the execution is in part fraud-

ulent (*Floyd* v. *Goodwin*, 8 Yerg. 484); or when the description of the land is so defective that it cannot be located (*Deloach* v. *State Bank*, 27 Ala. 437; *Marmaduke* v. *Tennant*, 4 B. Monr. 210; *Hughes* v. *Streeter*, 24 Ill. 647); or where the execution bears date after the defendant's death (*State* v. *Pool*, 6 Ired. [N. C.] 288 ; and in some of the States when the defendant died before the sale, even though the execution was issued before. *Davis* v. *Young*, 2 T. B. Monr. (Ky.) 60. So, where a sale is made by an officer after his term of office has expired, the sale is void, unless the statute makes provision therefor, and a statute, that authorizes an officer to sell personal property after his term expires, cannot be construed so as to authorize him to sell real estate. *Bank of Tenn.* v. *Beatty*, 3 Sneed (Tenn.), 305; *Merchants' Bank* v. *Harrison*, 39 Mo. 433. So, a sale made under a void execution is void (*Elliott* v. *Armstrong*, 2 Blackf. 198); or upon an execution issued against an infant's next friend, on a judgment against the infant. *Wilson* v. *McGee*, 2 A. K. Marsh. 600. So, where a sale is made under several executions, if one of them is void, the sale is void. *Brown* v. *McKay*, 16 Ind. 484. So, if an execution is issued in the name of an assignee of the judgment. *Morgan* v. *Davis*, 2 H. & M. (Md.) 9.

Sales under an execution, even though not void, will be set aside for irregularity when the irregularity is such as shows illegality or fraud (*Miller* v. *Cherry*, 2 Nev. 165; *Shirley* v. *Taylor*, 5 B. Monr. 99; *Estill* v. *Miller*, 3 Bibb, 177); and such a levy or sale will be set aside upon application of the plaintiff in the execution when it appears that the levy was made under a misapprehension of facts, and the plaintiff's debt is not satisfied in fact, although appearing to be under the levy and officer's return. As, where the land really belonged to a third person (*Wambaugh* v. *Gates*, 11 Paige, 505; *Baldwin* v. *Thompson*, 15 Iowa, 504); or where a lot of land not advertised was sold under a supposition that it was the one advertised (*Mason* v. *Thomas*, 24 Ill. 285); or where the defendant had no interest in the land (*De Wolf* v. *Mallett*, 3 Dana [Ky.], 214); or where the land was exempt from sale by statute. *Watson* v. *Reissig*, 24 Ill. 281. A sale under an execution will be set aside upon the application of the defendant when it was tainted with illegality or fraud (*Reynolds* v. *Nye*, 1 Freem. [Miss.] Ch. 462; *Dudley* v. *Cole*, 1 Dev. & B. [N. C.] Eq. 429; *Daniel* v. *Modawell*, 22 Ala. 365; *Worland* v. *Kimberlin*, 6 B. Monr. 608; *Nelson* v. *Brown*, 23 Mo. 13); as if there was any collusion between the sheriff and the bidder (*Nelson* v. *Brown*, 23 Mo. 13); or where the purchaser practices any deceit or trick for the purpose of getting possession of the property. *Jones* v. *Portsmouth R. R. Co.*, 32 N. H.

544; *Stewart* v. *Nelson*, 25 Mo. 309; *Forelander* v. *Hicks*, 6 Ind. 448. So, where a sale is made for a price so grossly inadequate as to evince a fraudulent purpose, the sale will be set aside without other proof of fraud. As, where a sheriff, having several executions against a person, obtained written permission from him to sell part of his estate without advertising it, took a person into the woods with him and sold him land worth $400 for $1.00; the court held that the facts, coupled with the great inadequacy of price, were such evidence of fraud and extortion that the sale must be set aside (*Gist* v. *Frazier*, 2 Litt. [Ky.] 118); and, where the inadequacy of the price is such as to awaken a great suspicion of fraud, the sale will be set aside. *Nelson* v. *Brown*, 23 Mo. 13. Thus, where property worth $9,000, and incumbered for only $4,800, was sold at sheriffs' sale for $80.41 in the absence of the defendant and a subsequent incumbrancer, it was held that, although all the legal formalities had been complied with, yet the sale was made contrary to the spirit and policy of the law, so as to defeat the just claims of incumbrancers and the rights of the defendant, and should be set aside. *Cummins* v. *Little*, 16 N. J. Eq. 48. And a sale made under circumstances that are apparently and in fact prejudicial to the rights of the defendant or subsequent incumbrancers, and such as to warrant a suspicion of unfairness on the part of the sheriff or the execution creditor, will always be set aside on application of the proper parties.

Thus, where a sale of land was advertised to be made at one o'clock in the afternoon, at which time the sheriff offered it for sale and struck it off at half-past one, he knowing at the time that such sale would cut off the second mortgagee of the premises from all security, and that the second mortgagee intended to be present at the sale, and when he was prevented by an accident from being present until five minutes of two, the sale was set aside (*Seaman* v. *Riggins*, 2 N. J. Eq. 214); so where the plaintiff's attorney became the purchaser of lands at a sheriff's sale on the execution, and sent the execution to another county and had the sale made without the defendant's knowledge and misinformed a person intending to purchase, of the day of the sale, the court set this sale aside as fraudulent. *Blight* v. *Tobin*, 7 T. B. Monr. 612. Perfect fairness is required and where the circumstances are such as to indicate a purpose to deal unfairly with the defendant, or other parties interested, as to the sale, it will be set aside. As where the judgment has been in part paid and the sale is made for the whole amount thereof without reference to the payment (*Davie* v. *Long*, 4 Bush, 574); so where land is levied upon and sold under circumstances that indicate that the creditor or the sheriff did not intend that the debtor

should know of the sale (*Hamilton* v. *Quimby*, 46 Ill. 90); or where the sheriff, at the time of the sale, has money enough in his hands to satisfy the execution, the sale will be set aside. *Zylstra* v. *Keith*, 2 Dessau. (S. C.) 140. Where land was sold upon an execution and bid in by the plaintiff's attorney, away from any house or improvement, and not within the boundaries of the land, and there was no proof that the sale was advertised, and there were, in fact, only five persons besides the sheriff present at the sale, it was set aside as fraudulent and void, although the bill for that purpose was not brought until several years afterward. *Howell* v. *McCreery*, 7 Dana (Ky.), 388. But, in order to warrant the court in setting aside a sale where there are no irregularities, upon the ground of fraud, it must appear that the purchaser was cognizant thereof. Thus, where the sheriff promised the defendant to adjourn the sale, and in violation sold it on the day fixed for the sale, for a merely nominal price, the court refused to set the sale aside, it not appearing that the purchaser was a party to the fraud. *Outcalt* v. *Disborough*, 3 N. J. Eq. 214. Neither will a sale be set aside for an irregularity when the statute gives the party injured an ample remedy against the sheriff (*Shores* v. *Scott, etc., Co.*, 17 Cal. 626; *Smith* v. *Randall*, 6 id. 47); nor generally will a sale be set aside as to the purchaser for a mere irregularity of which he was not cognizant (*Adamson* v. *Cummins*, 10 Ark. 541; *Thompson* v. *Phillips*, 1 Baldw. [C. C.] 246); especially when the defendant does not appear to have been injured by the sale. *Carr* v. *Glasscock*, 3 Gratt. 343; *Floyd* v. *McKinney*, 10 B. Monr. 89; *Sanford* v. *Durfee*, 19 Pick. 485; *Maddox* v. *Sullivan*, 2 Rich. Eq. 4; *Coriell* v. *Ham*, 4 Green (Iowa), 455; *Falkner* v. *Guild*, 10 Wis. 563; *Waggoner* v. *Dubois*, 19 Ohio, 67. The rule is, that a sale under an execution or other process that is void, is absolutely void, and can convey no title, legal or equitable, to the purchaser, but that, when the sale is merely erroneous and voidable, the defects which render it so cannot only be taken advantage of in direct proceedings for the purpose of having the errors corrected, and, unless removed or set aside by the court from which it issued, the process will be valid for all purposes as to strangers, or in collateral proceedings. *Sabin* v. *Austin*, 19 Wis. 421; *Cockerell* v. *Wynn*, 12 Sm. & M. 117; *Lawson* v. *Jordan*, 19 Ark. 297; *Emley* v. *Drum*, 36 Penn. St. 123; *Alexander* v. *Miller*, 18 Tex. 893; *Bossier* v. *Kennedy*, 19 La. Ann. 107. But this is not the case when the sheriff has sold lands which he had no right to sell. *Harris* v. *Murray*, 28 N. Y. 574.

When land is sold under an execution, unless redeemed by the debtor within the period prescribed by statute, if the statute makes provision

for its redemption by the debtor, the sheriff must execute a deed thereof to the purchaser in the manner prescribed by statute, or if no method is specially prescribed, then according to the formalities prescribed for the execution of conveyances generally (*Harrison* v. *Kramer*, 3 Iowa, 543; *Simonds* v. *Catlin*, 2 Caines [N. Y.], 61; *Hawley* v. *Cramer*, 4 Cow. 717); and in New York it has been held that no title will pass to a purchaser of lands at sheriff's sale, unless some deed or memorandum thereof gned by the sheriff is given. *Jackson* v. *Catlin*, 2 Johns. 248. But it is generally held, that a sale of lands by a sheriff under an execution is not within the statute of frauds (*Elfe* v. *Gadsden*, 2 Rich. [S. C.] 373; *Hart* v. *Rector*, 13 Mo. 497; *Duvall* v. *Peach*, 1 Gill [Md.], 172; *Hadden* v. *Johnson*, 7 Ind. 394; *Alexander* v. *Merry*, 9 Mo. 514); and the sale is not void but may be enforced by the purchaser against the sheriff and the giving of a deed compelled. *People* v. *Irvin*, 14 Cal. 428; *People* v. *Fleming*, 2 N. Y. 484. A purchaser at a sheriff's sale, unless otherwise provided by statute, acquires no right of entry upon the land until he obtains a deed (*Young* v. *Withers*, 8 Dana, 165; *Simonds* v. *Catlin*, 2 Cai. [N. Y.] 61); and it is held that, unless the deed is executed as required by statute, it passes no title to the purchaser. *Allen* v. *Moss*, 27 Mo. 354; *Roads* v. *Symmes*, 1 Ohio, 281. But the contrary is held in Pennsylvania (*Moorhead* v. *Pearce*, 2 Yeates [Penn.], 456); and in Maryland the title passes under the sale without any deed (*Boring* v. *Lemmon*, 5 H. & J. 223); and in any event it would seem that any defect in the deed can only be taken advantage of by an innocent purchaser without notice. *Harrison* v. *Kramer*, 3 Iowa, 543. The deed should be executed by the sheriff making the sale, even though his term of office has expired (*Allen* v. *Trimble*, 4 Bibb, 21; *Anthony* v. *Wessel*, 9 Cal. 103; *Bearfield* v. *Stevens*, 1 Harp. 52); unless provision for such a contingency is made by statute, in which case the statutory mode should be pursued to procure a deed (*Thornton* v. *Boyd*, 25 Miss. 598; *Harris* v. *Irwin*, 7 Ired. 432; *Phillips* v. *Jamison*, 14 B. Monr. 466); and where the sale is made by a deputy sheriff, a deed may be executed by him in his own name unless the statute otherwise provides (*Haines* v. *Lindsey*, 4 Ohio, 88; *Jackson* v. *Bush*, 10 Johns. 223); or in the name of the sheriff by him. *Young* v. *Smith*, 10 B. Monr. 293; *Carr* v. *Hunt*, 14 Iowa, 206; *Glasgow* v. *Smith*, 1 Overt. (Tenn.) 144; *Haines* v. *Lindsey*, 4 Ohio, 88; *Lewis* v. *Thompson*, 3 Cal. 266; *Evans* v. *Wilder*, 7 Mo. 359. But in California it is held that a deputy sheriff cannot execute a deed after his term has expired (*Cloud* v. *El Dorado*, 12 Cal. 128; *Mills* v. *Tukey*, 22 id. 373); and in Missouri it is held that he cannot

execute it in his own name as deputy, but must execute it in the name of the sheriff. *Evans* v. *Wilder*, 7 Mo. 359; *Evans* v. *Ashley*, 8 id. 177.

The deed must be executed to the purchaser or his assignee, or to his personal representatives, or his heirs (*Landrum* v. *Hatcher*, 11 Rich. [S. C.] 54; *Davis* v. *McVickers*, 11 Ill. 327; *Swink* v. *Thompson*, 31 Mo. 336; *Johnson* v. *Addleman*, 35 Ill. 265; *Ehleringer* v. *Moriarty*, 10 Iowa, 78); and if a deed is made to any other person than the purchaser or his personal representatives, it must appear upon the face of the deed that it was made by the express authority of the purchaser (*Rice* v. *Smith*, 18 N. H. 369; *Morgan* v. *Hannah*, 11 Humph. 122); and where a deed is made to an assignee of the purchaser, and a certificate of sale is required to be given to him by the sheriff, a valid deed cannot be made to a person as assignee unless he was in fact the assignee of the certificate, although the deed recites that he was the assignee of the certificate. *Carpenter* v. *Sherfy*, 71 Ill. 427. Until a valid deed is executed, the purchaser acquires no such title to the land as can be sold upon an execution against him (*Hinsdale* v. *Thornton*, 74 N. C. 167; *Bowman* v. *People*, 82 Ill. 246; *Kidder* v. *Orcutt*, 40 Me. 589; *Hagerman* v. *Jackson*, 1 Wend. 502; *Den* v. *Steelman*, 5 Halst. 193); but in Pennsylvania it has been held that a purchaser at sheriff's sale acquires such an interest in the land *before* the sheriff's deed is executed, as may be bound by a judgment against him (*Morrison* v. *Wurtz*, 7 Watts, 437); and such is probably the rule in Maryland. *Stump* v. *Henry*, 6 Md. 201, 209; *Remington* v. *Linthicum*, 14 Pet. (U. S.) 84.

But the solution of this question will depend entirely upon the statute. If the statute provides that the sheriff shall execute a deed of the land to the purchaser, and in a certain mode, and by certain formalities, the title does not pass until a deed is executed *in the mode provided by statute* (*Young* v. *Withers*, 8 Dana, 165); as, where the statute requires that the deed shall be acknowledged by the sheriff in open court, a deed not so acknowledged is void and passes no title. *Allen* v. *Moss*, 27 Mo. 354; *Roads* v. *Symmes*, 1 Ohio, 281; *Glancey* v. *Jones*, 4 Yeates (Penn.), 212. If the sheriff has not complied with the statute in the sale of the land, or as to the formalities required, the purchaser acquires no title thereto under his deed. Thus, where the officer's return, the certificate of sale, and the deed, were not uniform, the deed was held invalid. *Dickerman* v. *Burgess*, 20 Ill. 266. So, a deed is inoperative if executed by the sheriff before the expiration of the period of redemption fixed by law, because at the time when the deed was executed the sheriff had no authority to make it. *Bernal* v. *Gleim*, 33 Cal. 668; *Gorham* v. *Wing*, 10 Mich. 486. So, where a deed is exe-

cuted after the execution debt is paid, it is void. *Sweeney* v. *Craddocks*, 6 B. Monr. 590. So, where the statute requires that the deed shall be acknowledged before the court from which it issued, if it is acknowledged before any other court, it is void. *Dehaven's Appeal*, 75 Penn. St. 337. So, where the statute provides that the sheriff's proceedings under a levy upon land shall be examined and approved by the court, and an order for the execution of a deed to be made, a deed executed without a compliance with *all* of these formalities is invalid (*Curtis* v. *Norton*, 1 Ohio, 278); nor is a sheriff's deed valid if the sale was fraudulent or collusive as between the sheriff and the purchaser. Thus, where there was an arrangement between the sheriff and the purchaser by which the land sold for a merely nominal price, which was a fraud upon the debtor, it was held that the purchaser acquired no title under the deed, and consequently could pass none to a grantee. *Barnes* v. *Meeds*, 8 Ired. (N. C.) L. 292. The sheriff cannot become a purchaser at his own sale, either for himself or as the agent of another, and a deed made by him upon such a purchase is void. *McLeod* v. *McCall*, 3 Jones' (N. C.) L. 87. Of course, a sheriff's deed is inoperative if it professes to convey lands that were not levied upon or sold, but if it really includes the land levied upon and sold, the fact that it comprises more, or other land than that sold, will not render it inoperative *in toto*, but only as to the excess (*Farys* v. *Farys*, 1 Harp. [S. C.] 261; *Reid* v. *Heasley*, 9 Dana [Ky.], 325); provided that the land really sold can be identified. The rule is that if the description of premises in a deed or levy is sufficiently certain, so that they can be identified, the deed or levy is good, although some particulars are false or inconsistent (*Dygerts* v. *Pletts*, 25 Wend. 402; *Wing* v. *Burgis*, 13 Me. 111; *Parker* v. *Swan*, 1 Humph. 80; *Hart* v. *Rector*, 7 Mo. 531; *Huggins* v. *Ketchum*, 4 Dev. & B. [N. C.] L. 414); and if the deed does not convey all the land purchased, a court of equity will compel a correction in that respect, or set aside the sale upon application of the purchaser. *Waldron* v. *Letson*, 15 N. J. Eq. 126. If the description in the deed is so vague and uncertain that the property conveyed cannot be identified with a proper degree of certainty, no title will pass. *Throckmorton* v. *Moon*, 10 Ohio, 42; *McGary* v. *Dunn*, 1 La. Ann. 338; *Jackson* v. *Rosevelt*, 13 Johns. 97; *Clemens* v. *Rannells*, 34 Mo. 579. But a misrecital of the judgment or execution in the deed will not vitiate it, if the identity is made clear (*Hinds* v. *Scott*, 11 Penn. St. 19; *Peck* v. *Mallams*, 10 N. Y. 509; *Loomis* v. *Riley*, 24 Ill. 307); nor will such misrecitals justify the rejection of the deed as evidence. *Den* v. *Taylor*, 16 N. J. Law, 532; *Hunter* v. *Miller*, 36 Mo. 143; *Zabriskie* v. *Meade*, 2 Nev. 285.

But if, from the recitals in the deed, it is evident that the sheriff did not comply with the statute in making the sale, it is void. *Tanner* v. *Stine*, 18 Mo. 580. Yet if the deed recites enough to show that his authority was good, the deed will be valid, although it does not recite *all* that the statute requires. *Perkins* v. *Dibble*, 10 Ohio, 433. The recitals in the deed are *prima facie* evidence of the facts stated. *Matter of Smith*, 4 Nev. 254; *Ellis* v. *Smith*, 10 Ga. 253; *Kelly* v. *Creen*, 53 Penn. St. 302; *Stephenson* v. *Thompson*, 13 Ill. 186; *Trotter* v. *Nelson*, 1 Swan (Tenn.), 7; *White* v. *Chesnut*, 11 Humph. 79; *Osborne* v. *Tunis*, 25 N. J. Law, 633; *McCormick* v. *Fitzmorris*, 39 Mo. 24; *Hardin* v. *Cheek*, 3 Jones' (N. C.) L. 135; *Thompson* v. *Leinard*, Wright (Ohio), 458. But in some of the States, in order to give it that effect the judgment and execution must be produced (*Weyand* v. *Tipton*, 5 S. & R. 332); and such, also, is the rule in California (*Sullivan* v. *Davis*, 4 Cal. 291); in Kentucky (*Smith* v. *Moreman*, 1 T. B. Monr. 154); in New Jersey, and indeed, probably in all the States when title is sought to be established under the deed. *Bolles* v. *Beach*, 22 N. J. Law, 680.

The *prima facie* effect of such recitals may be overcome by proof that the facts are different, and this may be proved by parol (*Jackson* v. *Vanderheyden*, 17 Johns. 167); as that the land was not advertised in the manner required by law (*Loyd* v. *Anglin*, 7 Yerg. [Tenn.] 428); or that the execution was withdrawn and the levy abandoned before the sale (*Jackson* v. *Vanderheyden*, 17 Johns. 167); or indeed any facts that show that there was no authority for such recitals. *Bowen* v. *Bell*, 20 Johns. 338; *Doe* v. *Roe*, 20 Ga. 689; *Jordan* v. *Bradshaw*, 17 Ark. 106. As previously stated, except where the statute otherwise provides, the title does not pass until a deed is executed by the proper officer in the manner prescribed by law. *Leyer* v. *Doyle*, 11 Rich. (S. C.) L. 109; *Anthony* v. *Wessel*, 9 Cal. 103. But ordinarily, the delivery of the deed has relation back to the time of sale, whenever it may be delivered (*Wood* v. *Turner*, 7 Humph. 517; *Kingman* v. *Glover*, 3 Rich. 27; *Kane* v. *Mackin*, 9 Sm. & M. 387; *Oviatt* v. *Brown*, 14 Ohio, 285; *Crowley* v. *Wallace*, 12 Mo. 143); unless the rights of third persons will be prejudiced thereby. *Thomas* v. *Crofut*, 14 N. Y. 474; *Wright* v. *Douglass*, 2 id. 373; *Den* v. *Steelman*, 10 N. J. Law, 193; *Boyd* v. *Longworth*, 11 Ohio, 235; *Richardson* v. *Thornton*, 7 Jones' (N. C.) L. 458. But it cannot be used to prove title in an action brought after the deed was made. *Davis* v. *Evans*, 5 Ired. (N. C.) L. 525.

A purchaser of land at a sheriff's sale upon execution takes only such an estate therein as the debtor had at the time of sale (*Hildreth* v.

*Sands*, 2 Johns. Ch. 35; *Scott* v. *Purcell*, 7 Blackf. 66; *Mays* v. *Rose*, 1 Freem. Ch. 703); and stands in precisely the same position in reference thereto as he would have stood, if he had purchased from the debtor himself (*Ellis* v. *Smith*, 10 Ga. 253; *Hatch* v. *Wagner*, 15 Ill. 127); if it is affected by a trust, he takes it subject to the trust (*Pindall* v. *Trevor*, 30 Ark. 249); and he is affected with notice of the extent of the debtor's title and of all defects therein or equities incident thereto (*Richardson* v. *Wicker*, 74 N. C. 278; *Tally* v. *Reed*, id. 463); except that he is not affected by an unrecorded (*Borden* v. *McRae*, 46 Tex. 396; *Ellis* v. *Smith*, 10 Ga. 253) or fraudulent deed executed by the debtor before the sale. But he takes it subject to all legal incumbrances (*Galt* v. *Dibrell*, 10 Yerg. 146; *Coleman* v. *Hair*, 22 Ala. 596; *Harth* v. *Gibbs*, 3 Rich. [S. C.] 316; *Field* v. *Howell*, 6 Ga. 423); and subject to all equities existing against it at the time of purchase (*Allen* v. *McGaughey*, 31 Ark. 252; *Holman* v. *Holman*, 66 Barb. 215; *Raper* v. *Hackney*, 15 Fla. 323; *Taylor* v. *Lowenstein*, 50 Miss. 278); and there is no implied warranty on the part of either the sheriff or the debtor that the purchaser shall acquire a title in fee or that the land is free from incumbrances, or that the debtor will pay off the incumbrances. *Vanscoyoc* v. *Kimler*, 77 Ill. 151. In all cases where there are prior liens, the purchaser must pay them off in order to perfect his title (*Isler* v. *Colgrove*, 75 N. C. 334); in a word, except as to fraudulent or invalid conveyances made by the debtor, he stands in the debtor's shoes, as to the title. *Polhemus* v. *Empson*, 27 N. J. Eq. 190; *Allen* v. *McGaughey*, 31 Ark. 252; *Pindall* v. *Trevor*, 30 id. 249; *Morris* v. *Robey*, 73 Ill. 462; *Richardson* v. *Wicker*, 74 N. C. 278. He may impeach a deed made by the debtor for fraud (*McCoy* v. *Watson*, 51 Ala. 466); and if the estate is merely an equity of redemption, he may redeem whenever the debtor had a right to redeem (*Tarver* v. *Ellison*, 57 Ga. 54); and in order to perfect his title he must pay off all prior liens of every kind. *Isler* v. *Colgrove*, 75 N. C. 334.

If the debtor was a tenant in common with another, on the land, the purchaser becomes so (*Fischer* v. *Eslaman*, 68 Ill. 78); and must accept the debtor's position as to liabilities legal or equitable existing either as incumbrances or as incidents of the title. *Polhemus* v. *Empson*, 27 N. J. Eq. 190; *Gerrish* v. *Clough*, 36 N. H. 519; *McGuire* v. *Faber*, 25 Penn. St. 436; *Parlin* v. *Churchill*, 30 Me. 187; *Carew* v. *Love*, 30 Ala. 577; *Gittens* v. *Lowry*, 15 Ga. 336; *Morton* v. *Welborn*, 21 Tex. 772; *Galt* v. *Dibrell*, 10 Yerg. (Tenn.) 146; *Nance* v. *Hooper*, 11 Ala. 552; *Bryan* v. *Sharp*, 4 Cal. 349; *McArthur* v. *Porter*, 1 Ohio, 99; *McKnight* v. *Gordon*, 13 Rich. Eq. 222. If the

execution or sale was void, he acquires no title (*Waite* v. *Dolby*, 8 Humph. 406); and if he went into possession under his deed and the sale is subsequently declared void, he is liable to the debtor for the rents and profits during the time he was in possession, deducting for such improvements as he may have made. *Martin* v. *Evans*, 1 Strobh. (S. C.) Eq. 350.

When, by statute, the execution purchaser is entitled to the immediate possession of the land, he is entitled to all crops growing thereon and which were not harvested at the time of sale (*Pitts* v. *Hendrix*, 6 Ga. 452); and, if the land is occupied by a tenant, is entitled to the rent from the day of sale. *Kline* v. *Chase*, 17 Cal. 596; *Stayton* v. *Morris*, 4 Harr. (Del.) 224. But if the rent for the term had previously been paid to the debtor, he cannot claim that the tenant shall pay the same over again for the unexpired term. *Sandel* v. *Douglass*, 27 La. Ann. 628. If the title to the land fails, the purchaser has no remedy against the sheriff or the creditor to recover the purchase-money paid (*Dunn* v. *Frazier*, 8 Blackf. 432; *England* v. *Clark*, 5 Ill. 486; *Whitmore* v. *Parks*, 3 Humph. 95; *Judice* v. *Kerr*, 8 La. Ann. 462); unless the statute makes provision therefor (*Gaines* v. *Merchants' Bank*, 4 La. Ann. 369); or the creditor was guilty of fraud. His remedy in such case is held to be against the execution debtor whose debt he has paid to the extent of the purchase-money. *Julian* v. *Beal*, 26 Ind. 220; *Geoghegan* v. *Ditto*, 2 Metc. (Ky.) 433. But if he fails to procure title *by the irregularity of the sale*, the judgment creditor alone is liable to him (*Hawkins* v. *Miller*, 26 Ind. 173); and he has been held to be liable to a *bona fide* purchaser for a return of the purchase-money *when the execution debtor had no title whatever in the premises sold.* *Brummel* v. *Hurt*, 3 J. J. Marsh. (Ky.) 709. But where the debtor has *any* title to the land, legal or equitable, the maxim *caveat emptor* applies, both in law and in equity, and no implied warranty exists (*Danley* v. *Rector*, 10 Ark. 211; *Hand* v. *Grant*, 10 Sm. & M. 514; *Wood* v. *Levis*, 14 Penn. St. 9; *Lang* v. *Waring*, 25 Ala. 625; *Saunders* v. *Pate*, 4 Rand. 8), either as to real or personal property, but he merely takes the place of the debtor as to the title. *Dougherty* v. *Linthicum*, 8 Dana, 194; *Julian* v. *Beal*, 26 Ind. 220.

Land held by a debtor by adverse possession is not subject to levy (*Hagaman* v. *Jackson*, 1 Wend. 502; *Myers* v. *Sanders*, 7 Dana, 506); until his title thereto has become perfect by possession (*Hagaman* v. *Jackson*, 1 Wend. 502; *Park* v. *Larkin*, 1 Overt. (Tenn.) 101; *Jarrett* v. *Tomlinson*, 3 W. & S. 514); nor can the interest of a debtor under an executory contract for the purchase of land who has not obtained possession or paid the purchase-money. *Hinsdale* v.

*Thornton*, 75 No. Car. 381; *Collins* v. *Robinson*, 33 Ala. 91; *Medisett* v. *Johnson*, 2 Blackf. 431; *Justice* v. *Carroll*, 4 Jones' (N. C.) Eq. 429; *Talbot* v. *Chamberlin*, 3 Paige, 219; *Disborough* v. *Outcalt*, 1 N. J. Eq. 298; *Bigelow* v. *Finch*, 17 Barb. 394; *Bogert* v. *Perry*, 17 Johns. 351; *Moore* v. *Simpson*, 3 Metc. (Ky.) 349; *Brant* v. *Robertson*, 16 Mo. 129; *Moody* v. *Farr*, 6 Sm. & M. 100; *Pitts* v. *Bullard*, 3 Ga. 5; *Gowing* v. *Rich*, 1 Ired. L. 553. But if the purchase-money has been paid, he acquires an interest which, under a statute permitting an equitable interest to be attached, may be levied upon and sold subject to the rights of the vendor. *Twogood* v. *Stephens*, 19 Iowa, 405; *Pitts* v. *Bullard*, 3 Ga. 5; *Anthony* v. *Rogers*, 17 Mo. 394; *Moody* v. *Farr*, 6 Sm. & M. 100. But it seems that this is not the case unless the *whole* purchase-money has been paid (*Delafield* v. *Anderson*, 7 Sm. & M. 630; *Melton* v. *Davidson*, 6 Ired. Eq. 194), for the reason, that the debtor has no rights under the contract that will enable him to enforce the conveyance, until all the conditions of the purchase have been complied with. *Barton* v. *Rushton*, 4 Dessau. 373; *Mount* v. *Harris*, 1 Sm. & M. 185; *Hanway* v. *Wallace*, 18 Ind. 377; *Wengert* v. *Zimmerman*, 33 Penn. St. 508. But when lands have been in fact conveyed, although the deed has not been recorded, it is subject to levy and sale upon an execution against the vendee. *Shields* v. *Mitchell*, 10 Yerg. (Tenn.) 1; *Clark* v. *Clark*, 2 Dev. Eq. 407.

A term for years in real estate is subject to levy and sale (*Barr* v. *Doe*, 6 Blackf. 335; *Williams* v. *Downing*, 18 Penn. St. 60; *Chapman* v. *Gray*, 15 Mass. 439; *Adams* v. *French*, 2 N. H. 387); or any legal possessory interest in lands (*Thomas* v. *Bowman*, 29 Ill. 426; *Talbot* v. *Chamberlin*, 3 Paige, 219; *McCaskle* v. *Amarine*, 12 Ala. 17); or any inchoate legal title (*Land* v. *Hopkins*, 7 id. 115); as land held under an entry or survey (*Falkner* v. *Leith*, 15 id. 9; *Heffly* v. *Hall*, 5 Humph. 581; *Thomas* v. *Marshall*, Hard. [Ky.] 22; or the interest of a miner in a mining claim (*McKeon* v. *Bisbee*, 9 Cal. 137); an estate in dower, or by curtesy after it has been set off, or assigned. *Nason* v. *Allen*, 5 Me. 479; *Pennington* v. *Yell*, 11 Ark. 212; *Graham* v. *Moore*, 5 Harr. (Del.) 318. But not before. Id. An estate for nine hundred and ninety-nine years must be levied upon and sold as land, observing all the formalities required in the sale of land. *Mun* v. *Carrington*, 2 Root, 15.

A life estate is subject to levy and sale (*McClure* v. *Melendy*, 44 N. H. 469; *Howell* v. *Woolfort*, 2 Dall. 75; *Roberts* v. *Whiting*, 16 Mass. 186; *Hitchcock* v. *Hotchkiss*, 1 Conn. 470); although the legal title is held by a third person in trust for the debtor (*Anderson* v. *Briscoe*, 12 Bush [Ky.], 344); so, a reversion or remainder is subject to levy and

sale (*Kelly* v. *Morgan*, 3 Yerg. [Tenn.] 437; *De Haas* v. *Bunn*, 2 Penn. St. 335; *Phillips* v. *Rogers*, 12 Metc. [Mass.] 405; *Murrell* v. *Roberts*, 11 Ired. 424; *Wiley* v. *Bridgman*, 1 Head, 68); and so is a mere leasehold interest in lands. *Bisbee* v. *Hall*, 3 Ohio, 449; *Shelton* v. *Codman*, 3 Cush. 318. But not the interest of a tenant by will or sufferance (*Colvin* v. *Baker*, 2 Barb. 206); and unless clearly within the provision of the statute, a contingent interest in lands is not subject to levy (*Jackson* v. *Middleton*, 52 Barb. 9); nor can the interest of a lessee for a share of the crops be levied upon until the crops are divided, unless the statute makes provision otherwise (*Gordon* v. *Armstrong*, 5 Ired. 409); nor is any merely equitable interest in land subject to levy or sale, except so provided by statute (*Smith* v. *McCann*, 24 How. [U. S.] 398; *Thompson* v. *Parker*, 2 Jones' [N. C.] Eq. 475; *Lenox* v. *Notrebe*, Hempst. 251); and even when the statute so provides, the right of a grantor to enter for condition broken does not come within the provision (*Edmondson* v. *Leach*, 56 Ga. 461); as the interest of a mortgagee until after foreclosure (*Blanchard* v. *Colburn*, 16 Mass. 345; *Brown* v. *Bates*, 55 Me. 520; *Trapnall* v. *State Bank*, 18 Ark. 53; *Glass* v. *Ellison*, 9 N. H. 69; *Huntington* v. *Smith*, 4 Conn. 235; *Coombs* v. *Warren*, 34 Me. 89; *Jackson* v. *Willard*, 4 Johns. 41; *Rickert* v. *Madeira*, 1 Rawle [Penn.], 325; *Randall* v. *Farnham*, 36 Me. 86); unless possibly upon an execution against both mortgagor and mortgagee. *Kelly* v. *Burnham*, 9 N. H. 20. Lands held by a person as trustee are not subject to levy and sale upon an execution against him (*Mitchell* v. *Robertson*, 15 Ala. 412; *Jimmerson* v. *Duncan*, 3 Jones' [N. C.] L. 537); nor in the absence of a statute giving that right can the interest of a *cestui que trust* be taken in execution (*Eyrick* v. *Hetrick*, 13 Penn. St. 488; *Wright* v. *Douglass*, 3 Barb. 554; *Earle* v. *Washburn*, 7 Allen, 95; *McKay* v. *Williams*, 1 Dev. & B. Eq. 398; *McIlvaine* v. *Smith*, 42 Mo. 45); and even in those States where by statute trust interests are liable to execution, it is held that it relates only to simple trusts for the benefit of one person only (*Wilkes* v. *Ferris*, 5 Johns. 335; *Lynch* v. *Utica Ins. Co.*, 18 Wend. 236); and where the trust is for the benefit of several persons, a court of equity will enjoin a sale of the interest of one *cestui que trust* upon execution. *Campfield* v. *Johnson* 5 N. J. Eq. 245. The interest of a joint tenant or tenant in common in lands may be taken upon execution, but the execution cannot be levied upon any particular portion of the land, but must be levied upon the debtors' share of the whole estate, or upon an undivided share thereof. *Smith* v. *Benson*, 9 Vt. 138; *Bartlett* v. *Harlow*, 12 Mass. 348.

§ 4. **As to personal property.** Any personal property belonging to

a debtor, excepting choses in action and equitable interests, that are not exempted by statute, may be taken and sold upon execution, provided the property is such that the officer can take and deliver the possession thereof to a purchaser under the execution either manually or in the mode prescribed by statute without committing an assault upon the debtor. Clothing, ornaments, jewelry, watches, etc., *upon the person* of the debtor cannot be levied upon, but if found off his person, they may be taken unless exempted by statute. *Post*, p. 756. But a horse may be levied upon although being ridden or driven by the debtor at the time, and so may any personal property not at the time upon the person of the debtor. *State* v. *Dilliard*, 3 Ired. (N. C.) L. 102. Money, such as bank bills or other recognized currency, gold, silver, copper and other coin, may be levied upon, but it cannot be forcibly taken from the debtor's person, nor can it be levied upon if in the possession of a third person. In such cases it can only be reached by trustee process, supplementary proceedings, or other statutory process. *Steele* v. *Brown*, 2 Va. Cas. 246; *Crane* v. *Freese*, 16 N. J. Law, 305; *State* v. *Lea*, 8 Ired. (N. C.) Law, 94; *State* v. *Lawson*, 7 Ark. 391; *Dolby* v. *Mullins*, 3 Humph. 437; *Brooks* v. *Thompson*, 1 Root, 216; *Rogers* v. *Bullen*, R. M. Charlt. 196; *Turner* v. *Fendall*, 1 Cr. (U. S.) 117; *Means* v. *Vance*, 1 Bailey (S. C.), 39. Thus, where a judgment was recovered against a person before a justice of the peace, and he paid the money to the justice in bank bills, it was held that they were not subject to levy upon an execution against the creditor (*Hooks* v. *York*, 4 Ind. 636. See, also, to the same effect, *Moorman* v. *Quick*, 20 Ind. 67); and money made under a levy cannot, in the absence of a statutory provision, be taken and applied in satisfaction of another execution under which no levy has been made (*Robinson* v. *Green*, 6 How. [Miss.] 223); and, generally, money in the hands of a sheriff, received upon an execution, is not subject to attachment or levy as the property of the execution creditor until it has been paid over to him. *Prentiss* v. *Bliss*, 4 Vt. 513; *Dawson* v. *Holcomb*, 1 Ohio, 275; *Winton* v. *State*, 4 Ind. 321; *Reddick* v. *Smith*, 4 Ill. 451; *Willes* v. *Pitkin*, 1 Root, 47.

In Pennsylvania, under the statute, coin and bank notes may be seized and levied upon in payment of debts, except where such money is raised by execution at the suit of the debtor, *or is in his personal possession* (*Herron's Appeal*, 29 Penn. St. 240), and even where by statute money in the sheriff's hands, made upon execution, is subject to levy, if it is assigned before levy, the assignee takes it in preference to the levying creditor. *Dupong* v. *Watkins*, 2 Rich. (S. C.) 328. Money paid into the clerk's office upon an execution or in redemption

of a mortgage, cannot be levied upon as the property of the person entitled to it under the execution or decree (*Sibert* v. *Humphries*, 4 Ind. 481; *Overton* v. *Hill*, 1 Murph. 47), and, generally, money in the hands of a third person cannot be levied upon as the property of an execution debtor. *Price* v. *Crump*, 2 H. & M. (Va.) 89. In England the courts have refused to order a sheriff to retain moneys received by him upon an execution in favor of a person against whom an execution was subsequently obtained (*Padfield* v. *Brine*, 3 Brod. & B. 294; 7 Moore, 127; *Knight* v. *Criddle*, 9 East, 48), or even to retain money realized as a surplus from a sale of the execution debtor's property. *Fieldhouse* v. *Croft*, 4 East, 510. The surplus so realized becomes a debt in favor of the person entitled thereto against the sheriff, and cannot be taken upon an execution not levied prior to the sale under which the surplus was realized (*Harrison* v. *Paynter*, 6 M. & W. 387. See, also, to same effect, *Robinson* v. *Green*, 7 Miss. 223; *Prentiss* v. *Bliss*, 4 Vt. 513; *Dawson* v. *Holcomb*, 1 Ohio, 275; *Reddick* v. *Smith*, 4 Ill. 451), unless the statute otherwise provides. *Wheeler* v. *Smith*, 11 Barb. 345. Growing crops, which are raised by cultivation, such as growing wheat (*Shepard* v. *Philbrick*, 2 Den. 174; *Whipple* v. *Foot*, 2 Johns. 418; *Stewart* v. *Doughty*, 9 id. 108), corn (*Craddock* v. *Riddlesbarger*, 2 Dana, 205; *Poole's Case*, 1 Salk. 368), or any other crop raised by labor and cultivation may be seized upon execution as the property of him who is entitled to harvest and remove the same (*Hare* v. *Pearson*, 4 Ired. 76; *Penhallow* v. *Dwight*, 7 Mass. 34; *Hartwell* v. *Bissell*, 17 Johns. 128; *Parham* v. *Thompson*, 2 J. J. Marsh. 159), and if the crop belongs to a tenant, the purchaser under the execution succeeds to all his rights. *Stewart* v. *Doughty*, 9 Johns. 108; *Poole's Case*, 1 Salk. 368. But growing timber, grass and other crops that grow naturally, and without cultivation, are realty, and not subject to levy and sale until actually severed. *Bank of Lansingburgh* v. *Crary*, 1 Barb. 542. Choses in action, as notes, bonds, bills of exchange, drafts, checks or other obligations, whether negotiable or not, are not subject to levy and sale upon execution, unless expressly made so by statute (*Ingalls* v. *Lord*, 1 Cow. 240; *Ransom* v. *Miner*, 3 Sandf. 692), nor, in the absence of a statute authorizing it, can the interest of a conditional purchaser of a chattel be taken in execution, until the condition is fully performed (*Strong* v. *Taylor*, 2 Hill, 326; *Herring* v. *Hoppock*, 15 N. Y. 409), nor can personal property that is mortgaged, and in the possession of the mortgagee, be taken on an execution against the mortgagor (*Lamb* v. *Johnson*, 10 Cush. 126; *Hendricks* v. *Robinson*, 2 Johns. Ch. 283; *Yedell* v. *Stemmons*, 15 Mo. 443), at least, after default

made (*Bailey* v. *Burton*, 8 Wend. 339; *Gelhaar* v. *Ross*, 1 Hilt. [N. Y.] 117; *Magee* v. *Carpenter*, 4 Ala. 469); nor can an equity of redemption in personal property be levied upon and sold, even though the execution is predicated upon a judgment upon the debt for which the mortgage was given. *Valentine* v. *Planters' Bank*, 1 Freem. Ch. 727; *Bronston* v. *Robinson*, 4 B. Monr. 142. But it is held that the interest of the mortgagor in possession before default is made may be the subject of levy and sale. *Schrader* v. *Wolflin*, 21 Ind. 238; *McDonald* v. *Foster*, 5 Ala. 664; *Merritt* v. *Niles*, 25 Ill. 282; *Rindskoff* v. *Lyman*, 16 Iowa, 260; *Bailey* v. *Burton*, 8 Wend. 339; *Curd* v. *Wunder*, 5 Ohio St. 92; *Manning* v. *Monaghan*, 28 N. Y. 585; *Galen* v. *Brown*, 22 id. 37. But if the mortgagee is in possession of the goods, they are not subject to levy and sale upon an execution, either against the mortgagor (*Mattison* v. *Baucus*, 1 N. Y. 295; *Sexton* v. *Monks*, 16 Mo. 156; *Adams* v. *Tanner*, 5 Ala. 740), or the mortgagee (*Harding* v. *Stevenson*, 6 H. & J. [Md.] 264; *Chapman* v. *Hunt*, 13 N. J. Eq. 370, *Wilson* v. *Gray*, 10 id. 323; *Whitesides* v. *Williams*, 2 Dev. & B. Eq. 153), and the same rules apply to pledgors and pledgees, or pawnors or pawnees (*Bakewell* v. *Ellsworth*, 6 Hill, 484; *Baugh* v. *Kirkpatrick*, 54 Penn. St. 84), unless otherwise provided by statute. *Anthony* v. *Shaw*, 7 R. I. 275. Property belonging to the execution debtor, in the hands of a third person having no claim or lien thereon, is subject to levy and sale as the property of the owner (*Jonau* v. *Dreux*, 1 La. Ann. 364), but money deposited with a banker cannot be levied upon, as the depositor has title to no specific pieces of money, but only a right to have an equal amount of money returned to him. *Scott* v. *Smith*, 2 Kans. 438; *Carroll* v. *Cone*, 40 Barb. 220. Spirituous liquors, although liable to seizure and destruction under the statute, are nevertheless property, and may be levied upon and sold upon execution. *Nutt* v. *Wheeler*, 30 Vt. 436; *State* v. *Johnson*, 33 N. H. 441. Manuscripts, which are the subject of a copyright, may be taken on execution. *Banker* v. *Caldwell*, 3 Minn. 94.

The interest of a person in personal property that he owns jointly with another is subject to levy, and the purchaser succeeds to his rights (*Hayden* v. *Binney*, 7 Gray, 416; *Johnson* v. *The Connecticut Bank*, 21 Conn. 148; *Islay* v. *Stewart*, 4 Dev. & B. [N. C.] L. 160; *Leonard* v. *Scarborough*, 2 Ga. 73; *Melville* v. *Brown*, 15 Mass. 82); and it is held that where one fraudulently, with the intent to defraud the creditors of an insolvent debtor, intermingles his money with that of the debtor in the purchase of personal property, so that it cannot be ascertained what interest each owns therein, the individual creditors of either may levy upon and sell it in satisfaction of their demand with-

out reference to the rights of the other therein. *Lanier* v. *Montgomery Bank*, 18 Ala. 625. The interest of one partner in the firm property may be taken and sold on execution against him, but such sale only passes to the purchaser such partner's interest in the surplus remaining after all the firm debts have been paid. *Dutton* v. *Morrison*, 17 Ves. Jr. 193; *Taylor* v. *Fields*, 4 id. 396; *Conant* v. *Frary*, 49 Ind. 530; *Olson* v. *Morrison*, 29 Mich. 395; *Howard* v. *Jones*, 50 Ala. 67; *Caldwell* v. *Scott*, 54 N. H. 414; *Shedd* v. *Wilson*, 27 Vt. 478. The right of a separate partner depends entirely upon his right as a copartner, as his right in the *corpus* of the firm property is simply his proportionate share after the firm debts are paid and the partnership accounts are taken (*Church* v. *Knox*, 2 Conn. 523; *Barber* v. *Hartford Bank*, 9 id. 407), and it follows that an individual creditor can only take the undivided share of such partner, subject to the rights of the other partners to apply it in liquidation of all the partnership debts. *Willis* v. *Freeman*, 35 Vt. 44; *McCauley* v. *Fulton*, 44 Cal. 355; *Switzer* v. *Smith*, 35 Iowa, 269; *Witter* v. *Richards*, 10 Conn. 40; *Rainey* v. *Nance*, 54 Ill. 29; *Broaddus* v. *Evans*, 63 N. C. 633; *Thompson* v. *Finnin*, 25 Tex. 56; *Williams* v. *Gage*, 49 Miss. 777; *Christian* v. *Ellis*, 1 Gratt. 396; *Bakus* v. *Murphy*, 39 Penn. St. 397; *McCulloh* v. *Dashiell*, 1 Har. & G. (Md.) 96; *Waldron* v. *Simmons*, 28 Ala. 629; *Allen* v. *Dunn*, 15 Me. 292. This rule, however, is not uniform, and in some of the States no preference exists in favor of firm over individual creditors at law, but relief must be sought in a court of equity. *Reed* v. *Shepperdson*, 2 Vt. 120. The same rule applies to levies made upon the real estate of a partnership, that is used for partnership purposes. The rule is, that real estate purchased with partnership funds, and used for partnership purposes, is to be treated as assets of the firm, and is first to be applied to the liquidation of the firm debts. *Uhler* v. *Semple*, 20 N. J. Eq. 288; *Fairchild* v. *Fairchild*, 64 N. Y. 471; *Ross* v. *Henderson*, 77 N. C. 170; *Mauck* v. *Mauck*, 54 Ill. 281; *York* v. *Clemens*, 41 Iowa, 95; *Little* v. *Snedecor*, 52 Ala. 167; *Russell* v. *Miller*, 26 Mich. 1; *Willis* v. *Freeman*, 35 Vt. 44; *Scruggs* v. *Blair*, 44 Miss. 406; *Fowler* v. *Bailley*, 14 Wis. 125; *Lime Rock Bank* v. *Phetteplace*, 8 R. I. 56.

An execution against an individual partner may be levied upon the land, but, as in the case of personal property, the execution creditor takes only such an interest therein as remains to the partner, after all the partnership debts are paid and the partnership account is taken. See Wood's Coll. Partnership, pp. 207–228, *notes*. When property is to be levied upon under an execution, the statute should be consulted

to ascertain whether it is exempt from levy or not, as its liability to be sold under legal process is to be determined by the law of the State where it is situated (*Hervey* v. *Locomotive Works*, 93 U. S. [3 Otto] 664; *Gilman* v. *Contra Costa County*, 8 Cal. 52; *Newell* v. *Hayden*, 8 Iowa, 140); and such laws are always construed liberally for the debtor. *Stewart* v. *Brown*, 37 N. Y. 350; *Bevan* v. *Hayden*, 13 Iowa, 122; *Gilman* v. *Williams*, 7 Wis. 329. It is, however, a personal privilege, and it is held in most of the States that it may be waived, either expressly or by implication. *Smith* v. *Hill*, 22 Barb. 656; *Beegle* v. *Wentz*, 55 Penn. St. 369; *State* v. *Melogue*, 9 Ind. 196; *Frost* v. *Shaw*, 3 Ohio St. 270; *Gresham* v. *Walker*, 10 Ala. 370. But, in order to constitute an implied waiver, the debtor must voluntarily have done, or omitted to do, something that he was bound either not to have done, or to have done, which has misled and prejudiced the plaintiff in the execution.

In Pennsylvania it has been held that the neglect of a debtor to request an appraisal in due season constitutes a waiver (*Bair* v. *Steinman*, 52 Penn. St. 432; *Line's Appeal*, 2 Grant's Cas. 197; *Hill* v. *Johnston*, 29 Penn. St. 362); while in Indiana (*Eltzroth* v. *Webster*, 15 Ind. 21), in Arkansas (*Atkinson* v. *Gatcher*, 23 Ark. 101), and in Alabama (*Jordan* v. *Autrey*, 10 Ala. 276), it has been held that, even though the debtor pointed out his property to the sheriff and executed a forthcoming bond therefor, he was not estopped from setting up and insisting upon his exemption rights; and in Texas (*Ross* v. *Lister*, 14 Tex. 469), and in Tennessee (*Denny* v. *White*, 2 Cold. 283) it is held that the debtor cannot waive his right to exemption; and in most of the States it is held that a prospective agreement waiving the right is contrary to public policy and void. *Maxwell* v. *Reed*, 7 Wis. 582; *Curtis* v. *O'Brien*, 20 Iowa, 376; *Kneettle* v. *Newcomb*, 22 N. Y. 249. In all cases, so far as the right to waive exemption is concerned, *when the execution is levied*, the question as to whether it can be done or not will depend upon the language of the statute, as to whether it was intended as a mere personal privilege to the head of the family, or for the benefit of the family. If the latter, it cannot be waived. *Ross* v. *Lister*, 14 Tex. 469. Where "tools or implements of trade" are exempted, it has been held that the press and types of a practical printer, used by him and his journeymen in the publication of a weekly newspaper, are within the exemption (*Sallee* v. *Waters*, 17 Ala. 482); particularly if they are used for upholding life, which is a fact for the jury to find. *Patten* v. *Smith*, 4 Conn. 450. A threshing machine, used by a farmer in threshing grain for others, as well as his own, has been held not to come within the provisions of a statute exempting "proper tools or im-

plements of a farmer." *Meyer* v. *Meyer*, 23 Iowa, 359. See, also, *Ford* v. *Johnson*, 34 Barb. 364. A lawyer's library is not embraced under an exemption of "tools of his trade." *Lenoir* v. *Weeks*, 20 Ga. 596. A horse used by a tanner, physician, farmer, or other person, is not exempt as "a tool of his trade." *Wallace* v. *Collins*, 5 Ark. 41; *Hanna* v. *Bry*, 5 La. Ann. 651. Under a statute exempting "mechanical tools," dental instruments are held to be exempt. *Maxon* v. *Perrott*, 17 Mich. 332. But under a statute exempting the tools of a mechanic," they are held *not* to be exempt. *Whitcomb* v. *Reid*, 31 Miss. 567; *Grimes* v. *Bryne*, 2 Minn. 89. The tools, instruments, stock and fixtures of a paper-mill are held not to be exempt under a statute exempting "tools, implements, material, stock and fixtures necessary for carrying on a trade or business" (*Smith* v. *Gibbs*, 6 Gray, 298); and, generally, it may be said that such exemptions only extend to such "tools," etc., requisite to carry on the debtor's principal occupation. *Smalley* v. *Masten*, 8 Mich. 529. A four wheeled wagon, used for the ordinary purpose for which a *cart* is used, is exempt under a statute exempting a *cart* (*Favers* v. *Glass*, 22 Ala. 621); and under a statute exempting a *wagon* a cart is exempt if used for the ordinary purposes of a wagon. *Quigley* v. *Gorham*, 5 Cal. 418. When the statute exempts "*a team*," it includes any team which may or can be used in the ordinary business of the debtor (*Becker* v. *Becker*, 47 Barb. 497); and extends even to a part interest that the debtor may have therein. *Radcliff* v. *Wood*, 25 Barb. 52. Where the debtor is entitled to two horses, and has three, the officer cannot determine which one he will take, but the choice lays with the debtor, and the officer is bound thereby. *Seaman* v. *Luce*, 23 Barb. 240. See *Brown* v. *Davis*, 9 Hun (N. Y.), 43. A statute exempting a team, horse, cow, or sheep, does not by implication exempt the necessary feed therefor. *Rue* v. *Alter*, 5 Den. 119. A pair of steer calves are held to be exempt under a statute exempting a "yoke of steers." *Mundell* v. *Hammond*, 40 Vt. 641. But a mare and colt four months old are not exempt under a statute exempting a "span of horses." *Ames* v. *Martin*, 6 Wis. 361. A stallion, if owned and kept for the use of a family as a work horse, is exempt under a statute exempting "one work-horse," although he is for a portion of the time used as a stud. *Allman* v. *Gann*, 29 Ala. 240. But in all cases where there is any question as to whether an article is used for the purpose for which it is exempted, it is for the jury to find the facts. *Patten* v. *Smith*, 4 Conn. 450. Under the exemption of household furniture "necessary for upholding life," the debtor is not restricted to *what is actually necessary*. The statute is humane in its spirit, and is to be liberally construed, and while the term "necessary" excludes superflu-

ous articles, and articles of luxury, yet, the debtor is not restricted to those articles only which are indispensable to the bare subsistence of a family, but embraces such articles as will enable them to live in a convenient and comfortable manner, and suitable to their rank and condition in life. *Montague* v. *Richardson*, 24 Conn. 338; *Clark* v. *Averill*, 31 Vt. 512; *Hart* v. *Hyde*, 5 id. 328; *Davlin* v. *Stone*, 4 Cush. 359. Neither a piano nor other musical instrument is exempt as furniture. *Dunlap* v. *Edgerton*, 30 Vt. 224; *Tanner* v. *Billings*, 18 Wis. 163. Under a statute exempting a cow, a heifer fourteen months old, that has never given milk, is held to be exempt (*Carruth* v. *Grassie*, 11 Gray, 211); and where the debtor owns *two* cows and one is mortgaged, the cow not mortgaged is exempt. *Greenleaf* v. *Sanborn*, 44 N. H. 16. In order to entitle a person to the benefit of the statute, it is sufficient if his family resides in the State, wherever he may be (*Bonnel* v. *Dunn*, 28 N. J. Law, 153); and though the words "of every citizen" are used, it is held to mean "inhabitants," and applies in favor of all, whether naturalized or not. *Cobbs* v. *Coleman*, 14 Tex. 594. Property actually on the person of a debtor; and his necessary clothing, though *not* at the time on his person, cannot be taken in execution. *Bumpas* v. *Maynard*, 38 Barb. 626; *ante*, p. 650. Rings and jewelry cannot be levied upon while on the person of the debtor; but can be reached under supplementary proceedings, where such proceedings are provided for. *Frazier* v. *Barnum*, 19 N. J. Eq. 316. The same rules as to the validity of a levy under a void execution, or one that is irregular, apply in the case of personal property, as apply to levies upon land. In most of the States, except where provision is otherwise made by statute, an effectual levy upon personal property can only be made by the officer taking the actual custody or control of the property. *Brown* v. *Pratt*, 4 Wis. 513; *Levy* v. *Shockley*, 29 Ga. 710; *Beckman* v. *Lansing*, 1 Edm. Sel. Cas. (N. Y.) 356. He need not necessarily take manual possession. *Bond* v. *Willett*, 31 N. Y. 102; *Roebuck* v. *Thornton*, 19 Ga. 149; *Very* v. *Watkins*, 23 How. (U. S.) 469; *Bullitt* v. *Winstons*, 1 Munf. 269. But he must take actual possession if he would hold the property against subsequent attachments or levies (*Ray* v. *Harcourt*, 19 Wend. 495); a waiver of these requisites may bind the debtor, but they are not operative against subsequent levying or attaching creditors. *Van Wyck* v. *Pine*, 2 Hill, 666; *Barker* v. *Binninger*, 14 N. Y. 270; *Watts* v. *Cleveland*, 3 E. D. Smith (N. Y.) 553; *Storm* v. *Woods*, 11 Johns. 110; *Camp* v. *Chamberlain*, 5 Denio, 198. To make a valid levy, the sheriff must have the goods in his view and power. Merely seizing a few articles outside of a store or warehouse, and proclaiming a levy upon goods that are locked up in a store, and not within view, is not an operative levy.

*Haggerty* v. *Wilber*, 16 Johns. 287. He should enter the store and take *actual possession* of the goods. He should assert his title to the goods under the execution, and his acts should be such that, except for the protection of the execution, he would be a trespasser (*Beekman* v. *Lansing*, 3 Wend. 446; *Green* v. *Burke*, 23 id. 490; *Westervelt* v. *Pinckney*, 14 id. 123; *Connah* v. *Hale*, 23 id. 462); and he should retain possession of them, and if he permits them to remain in the debtor's custody the levy is of no effect against a subsequent execution. *Storm* v. *Woods*, 11 Johns. 110; *Linton* v. *Ford*, 46 Penn. St. 294; *Levy* v. *Shockley*, 29 Ga. 710; *Brown* v. *Pratt*, 4 Wis. 513; *Bond* v. *Willett*, 31 N. Y. 102.

An officer with an execution in order to make a levy may break into a store or outbuilding. *Haggerty* v. *Wilber*, 16 Johns. 287. But even though the process commands the arrest of the defendant, it is not lawful for the sheriff to *force* his way into the debtor's dwelling (*Semayne's Case*, 5 Coke, 91; *Oystead* v. *Shed*, 13 Mass. 520; *Hooker* v. *Smith*, 19 Vt. 151; *Illsley* v. *Nichols*, 12 Pick. 270; *Curtis* v. *Hubbard*, 4 Hill, 437; *Boggs* v. *Vandyke*, 3 Harr. [Del.] 288); and the bare raising of a latch of an outer door is such force as will justify the debtor in using all the force necessary in expelling the sheriff from the premises (*Curtis* v. *Hubbard*, 1 Hill [N. Y.], 336; *Boggs* v. *Vandyke*, 3 Harr. [Del.] 288); and an entry effected by craft or false pretenses is unlawful, as, if the sheriff knocks, and before he is bid to enter, the door being partially opened to see who is there, he forces his way into the house. *Parke* v. *Evans*, Hob. 62 *a*. But it seems that this privilege does not extend to a lodger or boarder in the house. *Lee* v. *Gansel*, 1 Cowp. 1; *Cooper's Case*, Cro. Car. 544; Hale's P. C. 487. Where a building is occupied by several tenants, having a common entrance, an entry through the outer door would not justify the breaking of the door to either of the tenements. *Swain* v. *Mizner*, 8 Gray, 182. But, if the sheriff lawfully gains admission through the outer door, he may break open any inner doors, or any trunks for the purpose of executing the writ. *Lloyd* v. *Sandilands*, 8 Taunt. 250; *Ratcliffe* v. *Burton*, 3 B. & P. 223; *Taster's Crown Case*, 320. In order to justify an officer in breaking the outer door of a store or outbuilding, there must be a previous demand upon the person having authority to permit his entry. *Douglass* v. *State*, 6 Yerg. 525. But if no person is present upon whom demand can be made, he may force an entrance (*Fullerton* v. *Mack*, 2 Aik. [Vt.] 415); and so he may where entrance has been refused. *Fullam* v. *Stearns*, 30 Vt. 443; *Bean* v. *Hubbard*, 4 Cush. 85; *Davlin* v. *Stone*, id. 359.

The priority of executions under a levy depends either upon the

priority of attachment or levy, rather than upon the time when the sheriff received them. *Religious Society* v. *Hitchcock*, 2 Brown (Penn.), 333; *McCall* v. *Trevor*, 4 Blackf. 496; *Smith* v. *Lind*, 29 Ill. 24. *Tabb* v *Harris*, 4 Bibb (Ky.), 29; *Lash* v. *Gibson*, 1 Murph. 266; *Brown* v. *Clarke*, 4 How. (U. S.) 4; *Roskhill* v. *Hanna*, 15 id. 189; *Erwin* v. *Moore*, 15 Ga. 361. But in Mississippi it is held that the execution issuing upon the oldest judgment has priority (*Jennings* v. *Dennis*, 6 Sm. & M. 379); and such is the rule in North Carolina (*Ricks* v. *Blount*, 4 Dev. 128); and in Iowa (*Marshall* v. *McLean*, 3 Greene [Iowa], 363); while in several of the States, where no previous lien has been acquired by attachment, the question of priority is determined by the order in which the sheriff received them. *Childs* v. *Dilworth*, 44 Penn. St. 123; *McCants* v. *Rogers*, 3 Brev. (S. C.) 388. In the sale of property upon execution, the provisions of the statute as to notice, place of holding the sale, and, indeed, in all respects should be complied with, and, while a failure in those respects may not invalidate the sale, it renders the sheriff liable to the execution debtor. *Howe* v. *Starkweather*, 17 Mass. 240; *Husted* v. *Dakin*, 17 Abb. Pr. (N. Y.) 137; *Gantly* v. *Ewing*, 3 How. (U. S.) 707.

§ 5. **Who may defend under.** The sheriff, the execution creditor, the purchaser of property under execution, and all persons deriving title to property levied upon under an execution and sold in pursuance thereof, or their grantees or vendees, may defend, in any action brought against them therefor, under the execution, and, if the execution was valid, and the proceedings thereunder regular and no fraud was practiced, it will be a complete protection. *Maverick* v. *Salinas*, 15 Tex. 57; *Hogsett* v. *Ellis*, 17 Mich. 357; *Roberts* v. *Boylan*, 24 Ga. 40; *Abbey* v. *Dewey*, 25 Penn. St. 413.

§ 6. **Who cannot defend under.** Strangers to the execution, who are not privies to the proceedings thereunder, or who do not derive title through a vendee at an execution sale, nor a person who, having no authority, levies an execution, or who, knowing facts *dehors* the execution that render it void, cannot defend under it. *White* v. *Jones*, 38 Ill. 159; *Allen* v. *Portland Stage Co.*, 8 Me. 207; *Lowry* v. *Walker*, 4 Vt. 80.

§ 7. **When process is void.** When an execution is void, it affords no protection and no rights to the execution creditor, or to a purchaser at a sale under it; as, where at the time of issuing the execution the plaintiff (*Stewart* v. *Nuckols*, 15 Ala. 225; *Graham* v. *Chandler*, id. 342; *Trail* v. *Snouffer*, 6 Md. 308; *Bellinger* v. *Ford*, 21 Barb. 311), or the defendant was dead (*People* v. *Bradly*, 17 Ill. 485; *Cadmus* v. *Jackson*, 52 Penn. St. 295; *Thompson* v.

*Ross*, 26 Miss. 198; *Hurst* v. *Weathers*, 15 Ala. 417); or when the judgment on which the execution is issued is annulled (*Nabours* v. *Cocke*, 24 Miss. 44; *Wright* v. *Wright*, 6 Tex. 29); or when there is no judgment upon which it could issue (*Nabours* v. *Cocke*, 24 Miss. 44); or, indeed, when for any cause the execution is absolutely void, it affords no protection to the plaintiff, and confers no rights upon any person acting under it (*McLin* v. *Williams*, 28 Ga. 482; *Wiseman* v. *McNulty*, 25 Cal. 230; *Smith* v. *Dow*, 51 Me. 21); or when the acts of the sheriff are contrary to law in the sale of property, the sale is void and the execution gives no rights to the purchaser. *Smith* v. *Dow*, 51 Me. 21; *Tufts* v. *Hayes*, 31 N. H. 138; *Marini* v. *Mouraïn*, 5 La. Ann. 133; *Tyler* v. *Wilkerson*, 27 Ind. 450. A *ministerial officer* is protected in the execution of process, whether it issues from a court of *limited* or of *general* jurisdiction, even though such court has not *in fact* jurisdiction in the case, if, upon the face of the process, it appears that the court has jurisdiction of the *subject-matter*, and nothing appears in the process to apprise the officer that the court has not jurisdiction of the *person* of the party who is to be affected by the process. *Savacool* v. *Boughton*, 5 Wend. 170; *Hill* v. *Haynes*, 54 N. Y. (9 Sick.) 153; *Orr* v. *Cox*, 22 Minn. 485.

A requisition upon the sheriff in an action to recover the possession of personal property only protects him in taking the property specified from the possession of the defendant named. *Bullis* v. *Montgomery*, 50 N. Y. (5 Sick.) 352. If, however, the actual possession remains in the defendant, although there has been a transfer of title and a constructive change of possession, the process is a protection. Id. But, in such an action, the requisition only authorizes the taking of the chattels specified, from the defendant named in the action or his agent; and it is no protection if he takes them from another person, who sues him in trespass. *Otis* v. *Williams*, 70 N. Y. (25 Sick.) 208. See, also, for a more extended review of this question, *ante*, p. 750, § 4.

§ 8. **When process is irregular.** Mere irregularities in an execution, or in proceedings under it, do not invalidate a sale made in pursuance thereof, and the execution is a protection to the purchaser whether the sheriff can justify under it or not. *Carr* v. *Glasscock*, 3 Gratt. 343; *Daviess* v. *Womack*, 8 B. Monr. 388; *Lawson* v. *Jordan*, 19 Ark. 297; *Alexander* v. *Miller*, 18 Tex. 893; *Emley* v. *Drum*, 36 Penn. St. 123; *Waggoner* v. *Dubois*, 19 Ohio, 67; *Tillman* v. *Jackson*, 1 Minn. 183; *Anderson* v. *Clark*, 2 Swan (Tenn.), 156; *Sanford* v. *Durfee*, 19 Pick. 485; *Falkner* v. *Guild*, 10 Wis. 563.

The distinction in this respect consists in the fact that a mere irregularity can always be corrected upon application to the court, while a

defect, that goes to the foundation of the right to act at all, is a radical defect which the court cannot correct. *Swiggart* v. *Harber*, 5 Ill. 364. The sheriff cannot defend under an execution when he has failed to comply with the statutory requirements in his action under it. *Smith* v. *Randall*, 6 Cal. 47. But where an execution is merely irregular, it is a complete protection to him. *Read* v. *Markle*, 3 Johns. 523; *Avery* v. *Lewis*, 10 Vt. 332; *Chase* v. *Plymouth*, 20 id. 469. The rule is, that if a process *is regular upon its face, and not absolutely void*, by having been issued without authority of law, the officer can never be made a trespasser, although it may have been erroneously issued, and he is bound to execute such a process, and it is no justification to him in permitting an escape, or in refusing to make a levy under it, that the forms of law, in the issuing of the process, had not been complied with. *Swanzy* v. *Hunt*, 2 N. & M. (S. C.) 211; *Higdon* v. *Conway*, 12 Mo. 295; *Roberts* v. *Tennell*, 4 Litt. (Ky.) 286. He is not bound to look beyond the process itself, and if it is regular on its face, he must execute it. *Reed* v. *Rice*, 2 J. J. Marsh. 44; *Williams* v. *Stewart*, 12 Sm. & M. 533; *Brown* v. *Mason*, 40 Vt. 157. He cannot question the regularity of the process, and consequently is not liable for levying an irregular execution. *Ford* v. *Treasurer*, 1 N. & M. (S. C.) 234. But he is not justified in doing an illegal act under process, even though he is therein commanded to do so. Thus, if a process commands a sheriff to break into a dwelling-house, without stating any sufficient cause, he could not justify the act under the process, because he is not bound to do an illegal act even though the process directs it to be done. *Sanford* v. *Nichols*, 13 Mass. 286. If a process is void upon its face, the sheriff is not protected in executing it. *Boal* v. *King*, 6 Ohio, 11. But he is not to inquire as to the sufficiency of any proceedings anterior to the process; if it is issued by a court of competent jurisdiction, he must execute it, however irregularly obtained (*Buffandeau* v. *Edmondson*, 17 Cal. 436); and he cannot protect himself from liability for refusing to do so by showing an error or irregularity in the process (*Ginochio* v. *Orser*, 1 Abb. Pr. [N. Y.] 433; *Hecker* v. *Jarret*, 3 Binn. [Penn.] 404; *Brown* v. *Mason*, 40 Vt. 157); and it is held that he is protected by the process even though it is irregular upon its face. *Price* v. *Holland*, 1 P. & H. (Va.) 289. But if the process is void for want of jurisdiction in the court issuing it or for any other cause, he may justify a refusal to execute its command, or even an escape, upon the ground of its entire invalidity. *Carpenter* v. *Willett*, 31 N. Y. (4 Tiff.) 90.

§ 9. **Abuse of process.** If a sheriff or a party to any proceeding *abuse* the process of the court, that is, if he commits acts under it

in excess of his powers or legal rights under it, he is liable therefor, and as to such acts in excess of his powers under the process it affords him no protection whatever (*Green* v. *Rumsey*, 2 Wend. 621; *Weber* v. *Henry*, 16 Mich. 399; *Cantine* v. *Clark*, 41 Barb. 629; *Streeter* v. *Frank*, 4 Chand. [Wis.] 9); and this applies equally to fraudulent and oppressive acts done by him (Id.), as well as to acts that amount to a trespass. *Weber* v. *Henry*, 15 Mich. 399. But if he acts under the direction of the process, and in obedience to its special command as to the particular act, while he cannot justify his act under the process, yet he may be permitted to show in mitigation, that he acted under the process, and did no act except such as it directed. *Sandford* v. *Nichols*, 13 Mass. 286. An officer is not justified by his process in levying upon the property of a third person, as that of the debtor, and is liable as a trespasser to such person, or in trover, precisely the same as though he had had no process in his possession (*State* v. *Swigart*, 22 Ark. 528; *Hollowell, etc., Bank* v. *Howard*, 14 Mass. 181; *Rhodes* v. *Patterson*, 3 Cal. 469); and it is no defense that he acted honestly, and under the belief that the property belonged to the debtor, or that his act was the result of an innocent mistake. *Hollowell, etc., Bank* v. *Howard*, 14 Mass. 181; *James* v. *Thompson*, 12 La. Ann. 174; *Anthony* v. *Brooks*, 5 Ga. 576. *Ante*, p. 758, § 7. But where one has permitted his goods to become intermingled with those of another, so that an officer having an execution, after making reasonable inquiry and effort, is unable to distinguish the one from the other, and the owner does not himself identify or point them out to the officer, the officer is justified in taking the whole of the property and cannot be made liable to the owner therefor, until he has refused, after the owner has pointed out his property. *Robinson* v. *Holt*, 39 N. H. 557. An officer is not justified by his process in levying upon and selling goods belonging to the debtor that are exempt from levy (*Bonnell* v. *Dunn*, 28 N. J. Law, 153); neither can he justify under process the taking of property which he advertises, but neglects to sell. In such a case he becomes a trespasser *ab initio*, and liable to the debtor as such (*Bond* v. *Wilder*, 16 Vt. 393); nor can he justify the taking of property that is exempt from levy, upon the ground that he did not know which was exempt. As, when a flock of sheep was taken by an officer without leaving the debtor *ten* as allowed by law, the court held that it was no defense that he did not know *which ten* were exempt. It was his duty to have notified the debtor to select ten (*Frost* v. *Mott*, 34 N. Y. [7 Tiff.] 253); and, generally, when the sheriff is guilty of any illegal act, either at the time of the levy or subsequently thereto, prejudicial to the defendant, he is liable therefor. *Bond* v. *Wilder*, 16 Vt. 393; *Bonnell* v. *Dunn*, 28 N. J. Law, 153.

# CHAPTER XXV.

## FOREIGN CORPORATION.

### ARTICLE I.

#### GENERAL RULES AND PRINCIPLES.

**Section 1. In general.** At common law, process can only be served on a defendant, whether a natural person or a body corporate, within the State in which the action is commenced. *Buchanan* v. *Rucker*, 9 East, 192; *Borden* v. *Fitch*, 15 Johns. 121, 140; *Hall* v. *Williams*, 6 Pick. 240. It is also a well-settled rule of the common law, that the service of process on the president or principal officer of a corporation must be within the jurisdiction of the sovereignty where the artificial body exists. *McQueen* v. *Middletown Manuf. Co.*, 16 Johns. 6; *Clarke* v. *Steam Navigation Co.*, 1 Story (C. C.), 531; *Dawson* v. *Campbell*, 2 Miles (Penn.), 171. And inasmuch as a corporation can have no legal existence out of the boundaries of the sovereignty that created it (*Bank of Augusta* v. *Earle*, 13 Pet. 588; *Broome* v. *Galena, etc., Packet Co.*, 9 Minn. 239), it follows that, if a foreign corporation can be brought into court, it must be by virtue of some statutory provision. *Middlebrooks* v. *Springfield Fire Ins. Co.*, 14 Conn. 301; *Sullivan* v. *La Crosse, etc., Packet Co.*, 10 Minn. 386. But foreign corporations may, by the comity of nations, make contracts in other States, and establish agencies there, unless excluded from so doing, or unless it be against the policy or interest of the State. *Williams* v. *Creswell*, 51 Miss. 817. And see *Newburg Petroleum Co.* v. *Weare*, 27 Ohio St. 343; *Western Union Telegraph Co.* v. *Mayer*, 28 id. 521; *Home Ins. Co.* v. *Davis*, 29 Mich. 238; Vol. 2, tit. *Corporations*. And it has been held that where a corporation, created by the laws of one State, makes contracts and owns property in another State, a service of process on the officers of the corporation, while in such other State on the business of the corporation, in a suit against it in the courts of that State, on a contract made there, is a good service on the corporation. *Moulin* v. *Trenton, etc., Ins. Co.*, 25 N. J. Law, 57. And see *Bushel* v. *Commonwealth Ins. Co.*, 15 Serg. & R. (Penn.) 176. But in such case, the foreign corporation does not agree that, after being regularly sued,

it will not, as any other citizen of another State might, exercise its constitutional right to transfer the litigation to the courts of the United States. *Fisk* v. *Chicago, etc., R. R. Co.*, 53 Barb. 472. See *Sayles* v. *Northwestern Ins. Co.*, 2 Curt. (C. C.) 212.

§ 2. **When a defense.** Where a corporation confines its business to the State in which it is created, its officers are not clothed with their official character out of the limits of such State. A foreign corporation cannot therefore be summoned by service on its chief officer, who, at the time of service, may happen to be within the jurisdiction of the court. *Dawson* v. *Campbell*, 2 Miles (Penn.), 170. If sued under such circumstances, the proper remedy of the corporation is by a plea to the jurisdiction. *Camden, etc., Co.* v. *Swede Iron Co.*, 32 N. J. Law, 15.

The service of process on a traveling agent of an insurance company, or upon one authorized only to effect insurances, is held not to be a valid service upon the company, under a statute permitting corporations to be sued in any county where they may "have an agency or transact business." *Parke* v. *Commonwealth Ins. Co.*, 44 Penn. St. 422. See, also, *Sullivan* v. *La Crosse, etc., Packet Co.*, 10 Minn. 386.

If a corporation is described as created by the laws of two States, and as a citizen of one of them, it is a good defense that the other party is a citizen of one of the States, although he is not of the State of which the corporation is said to be a citizen. *Ohio, etc., R. R. Co.* v. *Wheeler*, 1 Black (U. S.), 286. And see *County of Allegheny* v. *Cleveland, etc., R. R. Co.*, 51 Penn. St. 228.

A foreign corporation, as well as one within the State where the suit is brought, may plead the statute of limitations to a suit on a contract. *People* v. *Trinity Church*, 30 Barb. 537; S. C. affirmed, 22 N. Y. (8 Smith) 44; Ang. & Ames on Corp., § 407 *a*. And see *Attorney-General* v. *Federal Street Meeting-house*, 3 Gray, 1.

§ 3. **When not a defense.** A corporation created by the laws of one State and carrying on business in another State is liable for injuries occasioned by its acts, on the same principles and to the same extent that individuals or companies incorporated by the laws of the latter State would be (*Austin* v. *New York, etc., R. R. Co.*, 25 N. J. Law, 381), and it cannot escape the consequences of its illegal acts by setting up that it holds its existence under a foreign government. *People* v. *Central R. R. of New Jersey*, 33 How. (N. Y.) 407; S. C., 48 Barb. 478; *Ahern* v. *Nat. Steamship Co.*, 3 Daly (N. Y.), 399; S. C., 11 Abb. (N. S.) 356. See *State* v. *Northern Railway Co.*, 18 Md. 193; *ante*, Vol. 2, pp. 337, 338. Although a corporation cannot migrate, it may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these

conditions may be that it shall consent to be sued there. If it does business there it will be presumed to have assented, and will be bound accordingly. *Lafayette Ins. Co.* v. *French*, 18 How. (U. S.) 405; *Railroad Co.* v. *Harris*, 12 Wall. 65, 81. And if a foreign corporation, sued in a State court, appears there and removes the suit to the United States court, it is too late to object to the jurisdiction of the State court, or to take any exception to the process by which the corporation was brought in, and it is not a valid objection, that not being an inhabitant or found within the district, the suit could not have been commenced in the United States court. *Sayles* v. *North Western Ins. Co.*, 2 Curt. (C. C.) 212; *Barney* v. *Globe Bank*, 5 Blatchf. (C. C.) 107, 112; *Sands* v. *Smith*, 1 Dill. (C. C.) 290.

When a foreign corporation has appeared in an action, it is as much within and subject to the jurisdiction of the court, as if it were a corporation under the laws of the State. *Murray* v. *Vanderbilt*, 39 Barb. 140; *Carpentier* v. *Minturn*, 65 id. 239; *Reynolds* v. *La Crosse, etc., Packet Co.*, 10 Minn. 178.

Corporations are prohibited by statute, in New York, from interposing the defense of usury. *Curtis* v. *Leavitt*, 15 N. Y. (1 Smith) 9; *Graves* v. *Lovell*, 6 Jones & Sp. (N. Y.) 154; *Strong* v. *New York Laundry Manuf. Co.*, 5 id. 279. And this statute has been held to be retrospective in its operation, and to apply to foreign corporations litigating in the courts of that State. *Southern Ins. Co.* v. *Packer*, 17 N. Y. (3 Smith) 51. But the provisions of this statute only prevent the avoidance by a corporation of its own contract upon the ground of usury. They do not apply to a case where the corporation succeeds to the rights of a party who might avail himself of the provisions of the usury laws. Where, therefore, property is pledged to secure a usurious loan, a corporation succeeding to the rights of the pledgor is not prohibited from demanding and recovering the property pledged. *Merchants, etc., Bank* v. *Commercial Warehouse Co.*, 49 N. Y. (4 Sick.) 635. And see Id., 643, *note*.

§ 4. **When and how interposed.** See Vol. 2, tit. *Corporations*; see, also, *ante*, p. 393, tit. *Abatement*. If a corporation be sued by a wrong name, or one not sufficiently certain, to take advantage of the misnomer, it should be pleaded in abatement, and not in bar. *Sunapee* v. *Eastman*, 32 N. H. 470; *Gilbert* v. *Nantucket Bank*, 5 Mass. 97; *Northumberland County Bank* v. *Eyer*, 60 Penn. St. 436.

# CHAPTER XXVI.

## FOREIGN SOVEREIGN, ETC.

### ARTICLE I.

#### GENERAL RULES.

**Section 1. In general.** It is a well-settled doctrine, that a sovereign cannot be made responsible in another State or nation for an act done in his sovereign character in his own country. *Duke of Brunswick* v. *King of Hanover*, 2 H. L. Cas. 1. Nor can a sovereign State, in its political capacity, be sued in the courts of another State or nation for the purpose of enforcing any remedy against it. *Manning* v. *State of Nicaragua, etc.*, 14 How. (N. Y.) 517. So, ambassadors and foreign ministers who are recognized as such by the president of the United States, as well as their domestics, or domestic servants, are exempt from the jurisdiction of the State courts. In this class of exempt persons are likewise included consuls and vice-consuls, secretaries of legation, and attachees. In all suits or proceedings against such persons, the supreme court of the United States has exclusive jurisdiction. 1 Wait's Pr. 121; *United States* v. *Ortega*, 4 Wash. (C. C.) 531. And in order to exempt the servant of a public minister from liability to be made a defendant in a State court, it is not necessary that he should reside in the house of his employer, provided he performs the duties of his office there. Nor is it material whether he is a foreigner or a native of the State. 1 Wait's Pr. 121; *Lockwood* v. *Coysgarne*, 3 Burr. 1676.

The exclusive jurisdiction of actions in which a State is a party defendant is vested in the courts of the United States. *Delafield* v. *State of Illinois*, 2 Hill (N. Y.), 159; 26 Wend. 192. Where a State is the real defendant, an action cannot be maintained by suing the governor of a State, in his official character, where the claim made upon him is founded solely upon his holding that office; and where no judgment could be had against him personally, the action will be considered as one against the State, as the real party on the record. *Governor of Georgia* v. *Madrazo*, 1 Pet. 110, 122. And see *Commonwealth of Kentucky* v. *Dennison*, 24 How. (U. S.) 66.

§ 3. **Waiver of defense.** Although a sovereign, or a sovereign State, in their political capacity, cannot be sued in the courts of another State or nation, for the purpose of *enforcing* any remedy against them (See *Wadsworth* v. *Queen of Spain; DeHaber* v. *Queen of Portugal*, 17 Q. B. 171), yet a State may be made defendant in an action, for the purpose of giving it an opportunity to appear, and thus to enable a court to decide more intelligently and equitably, in relation to demands which are sought to be enforced against other defendants. *Manning* v. *State of Nicaragua, etc.*, 14 How. (N. Y.) 517. States, as well as individuals, it may be presumed as a general rule, are the best judges of what affects their own dignity and advantage; and it may be safely left to their own sovereign option to determine whether they shall take part, or not, in any judicial controversy; not for the purpose of submitting themselves to the coercive power of the court, but for the purpose of enabling it to arrive at a correct and satisfactory determination. Id.

A foreign sovereign is competent to sue as plaintiff in our courts; and if he does so, he thereby submits himself to the jurisdiction, in respect to the matter sued for, and must answer on oath to a cross bill. *Duke of Brunswick* v. *King of Hanover*, 6 Beav. 1; 2 H. L. Cas. 1; *King of Spain* v. *Hallett*, 6 Cl. & F. 333. See *United States* v. *Wagner*, L. R., 2 Ch. App. 582; *Priolean* v. *United States*, L. R., 2 Eq. 659.

# CHAPTER XXVII.

## FORMER ADJUDICATION.

### ARTICLE I.

#### GENERAL RULES AND PRINCIPLES.

**Section 1. Definition and nature.** At common law, a judgment is the decison or sentence of the law, pronounced by a court, or other competent tribunal, upon the matter contained in the record. 3 Bla. Com. 395. And see *Blystone* v. *Blystone*, 51 Penn. St. 373; *Truett* v. *Legg*, 32 Md. 147. And a judgment is properly deemed a bar to further litigation, on principles of public policy, because the peace and order of society require that a matter once litigated should not again be drawn in question between the same parties or their privies. *Kilheffer* v. *Herr*, 17 Serg. & R. 319; *Crosby* v. *Jeroloman*, 37 Ind. 264. Human life is not long enough to allow of matters once disposed of being brought under discussion again; and for this reason it has always been considered a fundamental rule that, when a matter has once become *res judicata*, there shall be an end of question about it. WILLES, J., in *Great Northern Railway Co.* v. *Mossop*, 17 C. B. 140.

§ 2. **Conclusiveness between parties and privies.** It is a general principle, that a decision by a court of competent jurisdiction is binding and conclusive upon all other courts of concurrent power. This principle pervades every system of jurisprudence, and has become a rule of universal law, founded on the soundest policy. The general doctrine is clearly laid down in the *Duchess of Kingston's case*, 11 St. Tri. 198; S. C., 2 Sm. Lead. Cas. 573, by DE GREY, C. J., in delivering the opinion of all the judges. He says: "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true. *First*, that the judgment of a court of competent jurisdiction, directly upon the point, is, as a plea, a *bar*, or, as *evidence*, conclusive between the same parties, upon the same matter, directly in question in another court; *Secondly*, that the judgment of a court of exclusive jurisdiction, directly upon the point is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different

purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." In support of this general doctrine, see *Hibsham* v. *Dulleban*, 4 Watts (Penn.), 183; *Kilheffer* v. *Herr*, 17 Serg. & R. 319; *Harvey* v. *Richards*, 2 Gall. (C. C.) 216; *Dick* v. *Webster*, 6 Wis. 481; *Grant* v. *Ramsey*, 7 Ohio St. 157; *Page* v. *Esty*, 54 Me. 319; *Wingate* v. *Haywood*, 40 N. H. 437; *Van Dyke* v. *Bastedo*, 15 N. J. Law, 224; *Land* v. *Keirn*, 52 Miss. 341; *Trammell* v. *Thurmond*, 17 Ark. 203; *Russell* v. *Place*, 94 U. S. (4 Otto) 606; *Geary* v. *Simmons*, 39 Cal. 224; *Cannon* v. *Brame*, 45 Ala. 262; *Evans* v. *Birge*, 11 Ga. 265; *Hudson* v. *Smith*, 7 Jones & Sp. (N. Y.) 452; *Hatch* v. *Garza*, 22 Tex. 176. The difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action is, that the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action upon the same claim or demand, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been reasonably offered for that purpose. *Petersine* v. *Thomas*, 28 Ohio St. 596; *Bates* v. *Spooner*, 45 Ind. 489. But, as respects an action afterward brought between the same parties, upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. *Cromwell* v. *County of Sac*, 94 U. S. (4 Otto) 351. See *ante*, p. 679, tit. *Estoppel*.

§ 3. **What judgments are conclusive.** In general, a verdict and judgment in a court of common law, or a decree of a court of equity, is conclusive between the same parties upon the same subject-matter. *Breckenridge* v. *Ormsby*, 1 J. J. Marsh. (Ky.) 236; *Crandall* v. *Gallup*, 12 Conn. 365; *Chase's Case*, 1 Bland (Md.), 206; *Hopkins* v. *Lee*, 6 Wheat. 109; *Wadhams* v. *Gay*, 73 Ill. 415; *Howard* v. *Kimball*, 65 Me. 308. So, in all matters within the jurisdiction, the decrees of the probate court are final and conclusive, and can only be impeached for fraud, or reversed for error. *Ward* v. *State*, 40 Miss. 108; *McDougald* v. *Rutherford*, 30 Ala. 253; *Ringgold* v. *Stone*, 20 Ark. 526; *Jones* v. *Chase*, 55 N. H. 234; *Judge of Probate* v. *Fillmore*, 1 D. Chip. (Vt.) 423; *Dayton* v. *Mintzer*, 22 Minn. 393. So, a judgment of the board of police, when acting by authority of law, like that of

any other court having exclusive jurisdiction over both the subject and the person to be affected, is final until vacated or reversed according to law. *Carroll* v. *Board of Police*, 28 Miss. 38. When a judge, at the hearing of a bill in equity, adjudicates on the facts of the case, such adjudication is conclusive. *Gilmore* v. *Patterson*, 36 Me. 544. And the decision of a referee on a question within the power of the court to direct to be determined by a reference, and which might be reviewed by appeal, is a determination, which, when made an order of the court, is conclusive on the parties as *res adjudicata* if not appealed from. *Demarest* v. *Daig*, 11 Abb. (N. Y.) 9; S. C. affirmed, 29 How. 266; 32 N. Y. (5 Tiff.) 281. A verdict and judgment in a petition for partition are as conclusive, as to the matter put in issue and tried, as a verdict and judgment in any other proceeding, and may be set up as a bar to a writ of entry, in which the same question of title is put in issue. *Whittemore* v. *Shaw*, 8 N. H. 393. And see *Stean* v. *Anderson*, 4 Harr. (Del.) 209. So, a judgment for money found to be due upon a settlement of accounts, is conclusive as to the parties to the judgment. *Mattingly* v. *Nye*, 8 Wall. 370. A judgment entered by a justice of the peace showed that the parties appeared before him and went to trial, and after hearing the testimony, he rendered judgment against the plaintiff for costs; and this was held to be a judgment in bar, and that it constituted a good defense to a subsequent suit brought upon the same cause of action. *Zimmerman* v. *Zimmerman*, 15 Ill. 84. So, it is held that a judgment rendered by a justice of the peace, which is not appealed from, and which directs a forced sale of articles for its satisfaction, which are exempt, under law, from forced sale, is not a nullity, however erroneous; and, when no means have been used to correct the error by appeal, the conclusive force of the judgment cannot be evaded by a resort to an injunction. *Rountree* v. *Walker*, 46 Tex. 200. See, also, *O'Neil* v. *Martin*, 1 E. D. Smith (N. Y.), 404.

And generally, the rule of *res adjudicata* applies not only to the judgments of courts, but to all judicial determinations, whether made by courts in ordinary actions, or in summary or special proceedings, or by judicial officers in matters properly submitted for their determination. *Brown* v. *Mayor, etc., of New York*, 5 Daly (N. Y.), 481; S. C. affirmed, 66 N. Y. (21 Sick.) 385; *Shelbina Hotel Asso.* v. *Parker*, 58 Mo. 327, and cases cited above. And a judgment on an issue in bar, though it embraces also an issue in abatement, concludes the parties in all future controversies. *Sheldon* v. *Edwards*, 35 N. Y. (8 Tiff.) 279. See, also, *Mining Co.* v. *Bullion Mining Co.*, 3 Sawyer, 634. So, a prior judgment upon the same cause of action sustains the plea

of a former recovery, although the judgment is in an action commenced subsequently to the one in which it is pleaded. *Casebeer* v. *Mowry*, 55 Penn. St. 419; *Bellinger* v. *Craigue*, 31 Barb. 534; *Gates* v. *Preston*, 41 N. Y. (2 Hand) 13.

The power to create civil courts exists by the laws of war, in a place held in firm possession by a belligerent military occupant; and if their judgments and decrees are held to be binding on all parties during the period of such occupation as the acts of a *de facto* government, no valid ground can be assigned for refusing to them a like effect, when pleaded as *res adjudicata* before the regular judicial tribunals of the State after the return of peace. *Hefferman* v. *Porter*. 6 Coldw. (Tenn.) 391.

§ 4. **What judgments not conclusive.** A matter is not generally regarded as *res adjudicata* unless there be a concurrence of the four conditions following, namely; 1st. Identity in the thing sued for; 2d. Identity of the cause of action; 3d. Identity of persons and of parties to the action; 4th. Identity of the quality in the persons for or against whom the claim is made. 2 Bouv. Dict. 467; *Benz* v. *Hines*, 3 Kans. 390; *Atchison, etc., R. R. Co.* v. *Commissioners*, 12 id. 127; *Bradley* v. *Johnson*, 49 Ga. 412; *Davis* v. *Brown*, 94 U. S. (4 Otto) 423; *Howard* v. *Kimball*, 65 Me. 308. A judgment upon a widow's *caveat*, that she was not entitled to administration, is no bar to her bill as widow and heir at law, against the same defendant for an account and distribution of the estate. *Bradley* v. *Johnson*, 49 Ga. 412. Judgment in ejectment against the equitable holder of land under a bond for title, before payment, concludes nothing (*McCurry* v. *Robinson*, 23 Ga. 321); a judgment in attachment will be no bar to a subsequent suit unless accompanied or followed by a payment, or sale of the property attached, in due course of law (*Roose* v. *McDonald*, 23 Ind. 157); and a conditional judgment, being avoided by the non-performance of the conditions, cannot be pleaded in bar to a suit by one claiming the benefit of such conditions. *Commonwealth* v. *Pejepscut Proprietors*, 7 Mass. 399; *Nettleton* v. *Beach*, 107 id. 499. It is the termination and not the commencement of proceedings in one court which may be pleaded in another. *People* v. *Sheriff of Westchester*, 1 Park. (N. Y.) 659; S. C., 10 N. Y. Leg. Obs. 298. And a party is not concluded by the pendency of an action in the courts of another State, or of the United States, for the same matter, nor by any course of proceeding thereon short of final judgment. *Ante*, pp. 503, 504, §§ 9, 10. *Whitaker* v. *Bramson*, 2 Paine (C. C.), 209; *Cook* v. *Litchfield*, 5 Sandf. (N. Y.) 330. An award by an auditor upon a con-

tract is not final or conclusive upon the claimant, although he accept it. *Bogert* v. *United States*, 2 Ct. of Cl. 159.

§ 5. **It must be a judgment upon the merits.** In order that a former judgment should be a bar to any subsequent action for the same subject-matter between the same parties, it must appear that the suit in which it was rendered was determined on its merits (*Foster* v. *Busteed*, 100 Mass. 409; S. C., 1 Am. Rep. 125; *Jamaica Pond, etc., Co.* v. *Chandler*, 121 Mass. 1; *Verhein* v. *Schultz*, 57 Mo. 326; *Gay* v. *Stancell*, 76 No. Car. 369; *Peterson* v. *Nehf*, 80 Ill. 25; *Houston* v. *Musgrove*, 35 Tex. 594); and not on the ground of any technical defect, or because of the temporary disability of the plaintiff to sue, or because the cause of action had not accrued, or the like. *Gray* v. *Dougherty*, 25 Cal. 266; *Bell* v. *Hoagland*, 15 Mo. 360; *Moseby* v. *Wall*, 23 id. 81; *Schindel* v. *Suman*, 13 Md. 310; *Quackenbush* v. *Ehle*, 5 Barb. 469. A judgment rendered for defect of pleading is not a judgment upon the merits, and therefore is no bar to another action. *Kendal* v. *Talbot*, 1 A. K. Marsh. (Ky.) 321; *Smalley* v. *Edey*, 19 Ill. 207. The plea of *res adjudicata* does not rest on the regularity of the proceedings which can be reviewed on appeal, but upon the force of the judgment pronounced on the demand and cause of action between the parties. *Fluker* v. *Herbert*, 27 La. Ann. 284. The true test is, whether the same cause of action was litigated and adjudicated in the former suit. The form of the action may be different, but the grievance and wrong complained of must be the same in both suits. *Perry* v. *Lewis*, 49 Miss. 443.

§ 6. **Effect of a judgment by default, or a decree pro confesso.** The rule of *res adjudicata* applies not only to judgments rendered after a litigation of the matter in controversy, but to judgments rendered upon default. *Gates* v. *Preston*, 41 N. Y (2 Hand) 113; *Newton* v. *Hook*, 48 N. Y. (3 Sick.) 676; *Gifford* v. *Thorn*, 9 N. J. Eq. 702; *Briggs* v. *Richmond*, 10 Pick. 391. And a judgment by default regularly entered is as binding as any other, as far as respects the power and jurisdiction of the court in declaring that the plaintiff is entitled to recover, though the amount of the recovery, in some cases, remains to be ascertained by a jury. *Green* v. *Hamilton*, 16 Md. 317.

So, the neglect of a defendant to answer, and a decree *pro confesso*, are equivalent to an admission of the allegations of the bill as to all parties against whom such a decree passes. *Luckett* v. *White*, 10 Gill & J. (Md.) 480; *Atty.-Gen.* v. *Carver*, 12 Ired. (N. C.) Law, 231. But a bill taken for confessed against an absentee, after publication, who does not appear in the suit, is not evidence of any fact against

him, even as to his personal rights. *Danforth* v. *Woods*, 11 Paige, 9. And see *McCaskill* v. *M'Bryde*, 2 Ired. (N. C.) Eq. 52.

It has been held that a judgment taken by default in summary proceedings for non-payment of rent, until reversed, set aside or vacated, is conclusive, in an action by the landlord against the tenant to recover the rent, of the facts alleged in the affidavit and which are required by the statute to be alleged as the basis of the proceedings, to wit: the tenancy, the occupation by the tenant, the non-payment of rent due, and the holding over after default in payment (*Brown* v. *Mayor, etc., of New York*, 5 Daly [N. Y.], 481; S. C. affirmed, 66 N. Y. [21 Sick.] 385); but it is not conclusive as to the amount of rent due, although it is alleged in the affidavit upon which the proceedings were instituted. *Jarvis* v. *Driggs*, 69 N. Y. 24 Sick.) 143.

§ 7. **Effect of judgment by confession.** A judgment, as well by confession as otherwise, is conclusive, while it is in force, as to every thing that might have been pleaded or given in evidence in defense (*Moore* v. *Barclay*, 23 Ala. 739; *Miller* v. *Earle*, 24 N. Y. [10 Smith] 110; *Secrist* v. *Zimmerman*, 55 Penn. St. 446); except matter in set-off. *Barney* v. *Goff*, 1 D. Chip. (Vt.) 304; *Kauff* v. *Messner*, 4 Brewst. (Penn.) 98. A judgment in a justice's court in favor of a surgeon for professional services is a bar to any action by the defendant against him for malpractice in performing such service, and this is equally so, although the recovery was upon confession without trial. *Gates* v. *Preston*, 41 N. Y. (2 Hand) 113. So, in an action for the continuance of a diversion of the waters of a stream, a former proceeding upon the same cause of action and between the same parties, or those under whom they claim, wherein judgment was recovered by the plaintiff, is held to be conclusive of the rights of the parties, and this is true although the former judgment was by confession. *Schoch* v. *Foreman*, 3 Brewst. (Penn.) 157. But a judgment based upon a confession made without any request on the part of the creditor, and without his knowledge and entered at the instance of the debtor alone, will have no effect at the date of its entry; it will not bar an action brought by the creditor, nor will it estop the debtor from denying the act set forth. And its ratification by the creditor does not make it valid as against previous creditors. *Wilcoxson* v. *Burton*, 27 Cal. 228. In an amicable action instituted by A against B and C, C appeared and confessed judgment against himself and B, though it did not appear that B had any notice of the action, or had given any authority to C to confess judgment, and it was held that the judgment, though void as against B, was held valid as against C. *Calhoun* v. *Logan*, 22 Penn. St. 46.

§ 8. **Effect of judgment by consent, etc.** A decree or judgment entered by consent of the parties must have the same force and effect as any other, unless, upon the principles of equity, some ground can be shown for relief. *Richmond, etc., R. R. Co.* v. *Shippen*, 2 Patt. & H. (Va.) 327; *French* v. *Shotwell*, 5 Johns. Ch. 555; S. C. affirmed, 20 Johns. 668; *Ellis* v. *Mills*, 28 Tex. 584; *Dunn* v. *Pipes*, 20 La. Ann. 276. And a decree, deliberately, fairly, honestly and knowingly entered by consent of the attorney, is as binding as if entered by the court after the most pertinacious resistance. *Holmes* v. *Rogers*, 13 Cal. 191. And see *Brown* v. *Newman*, 13 Iowa, 546; Vol. 1, p. 441. So, a judgment entered by agreement, by a court of general jurisdiction, having power in a proper case to render such a judgment, and having the parties before it, will bind those by whose agreement it has been entered, notwithstanding the pleading would not, in a contested case, authorize such a judgment. *Fletcher* v. *Holmes*, 25 Ind. 458. So, by general usage in the courts of Massachusetts, a judgment rendered upon an agreed statement of facts, and purporting in its terms to be a final judgment, is a conclusive determination of the matter in controversy; and as such may be pleaded in bar to a new suit between the same parties for the same cause of action. *Porter* v. *Bussey*, 1 Mass. 436; *Derby* v. *Jacques*, 1 Cliff. (C. C.) 425. The same practice has been adopted by the courts of Maine. Id.; *Hallowell* v. *Gardiner*, 1 Me. 93.

Where a plaintiff brought suit against a town for an injury received by reason of an alleged defect in the defendant's highway, and a judgment was entered therein for the plaintiff, by agreement, such judgment was held to be conclusive upon the parties as to the existence of that cause of action. *Hillsborough* v. *Nichols*, 46 N. H. 379.

It has, however, been held that an attorney has no implied authority to compromise or give up any right of his client, nor to consent to a judgment against his client (*Swinfen* v. *Swinfen*, 24 Beav. 549; 1 C. B. [N. S.] 364; 2 DeG. & J. 381; *Wadhams* v. *Gay*, 73 Ill. 415), and that when a judgment or decree is rendered by consent, or is the result of a compromise, it cannot be admitted as *res adjudicata*. Id. See Vol. 1, pp. 434–444.

§ 9. **Effect of judgment of discontinuance.** At common law, the discontinuance of any suit or proceeding is no bar to a new action for the same cause. *Hull* v. *Blake*, 13 Mass. 155; *Delany* v. *Reade*, 4 Iowa, 292; *Miller* v. *Mans*, 28 Ind. 194; *Carlisle* v. *McCall*, 1 Hilt. (N. Y.) 399; *Gillilan* v. *Spratt*, 41 How. (N. Y.) 27. And if a plaintiff sues for several distinct causes of action, and, by leave of the court, withdraws one of them, and proceeds to judgment for the others, it is

no bar to a subsequent action for the claim so withdrawn. *Killion* v. *Wright*, 34 Penn. St. 91; *Wood* v. *Corl*, 4 Metc. 203. And where a plaintiff appealed from the judgment of a justice to the circuit court, and subsequently "came into court and dismissed his suit," it was held that the judgment appealed from had been annulled, and could constitute no bar to another suit on the same cause. *Dossett* v. *Miller*, 3 Sneed (Tenn.), 72.

§ 10. **Effect of judgment of nonsuit.** It is likewise an undoubted rule that a nonsuit, suffered for any cause, is not a bar to an action subsequently brought upon the same cause of action. *Jay* v. *Carthage*, 48 Me. 353; *Eaton* v. *George*, 40 N. H. 258; *Audubon* v. *Excelsior Ins. Co.*, 27 N. Y. (13 Smith) 216; *Merritt* v. *Campbell*, 47 Cal. 542; *Westcott* v. *Bock*, 2 Col. T. 335. A judgment of nonsuit, even upon an agreed statement of facts, cannot be pleaded in bar to a new suit, although it was rendered by a court of competent jurisdiction, and was between the same parties and for the same subject-matter. *Knox* v. *Waldoborough*, 5 Me. 185; *Wade* v. *Howard*, 8 Pick. 353; *Derby* v. *Jacques*, 1 Cliff. (C. C.) 425. So, where after the filing of a plea of set-off, and the nonsuiting of the plaintiff, the court rendered judgment for the defendant for a balance claimed by him, it was held that the judgment was no bar to a suit afterward brought by the plaintiff upon his original claim. *Anderson* v. *Gregory*, 43 Conn. 61.

And when a judgment is reversed, and the cause remanded for further proceedings, and the plaintiff in the court below them voluntarily becomes nonsuit, he is not estopped from bringing a new action. *Holland* v. *Hatch*, 15 Ohio St. 464.

But it is held in New York, that a nonsuit or dismissal of the complaint ordered by a justice of the district court, after the cause has been finally submitted by the plaintiff, on a trial on the merits, even if ordered with the plaintiff's consent, must be regarded as a judgment for the defendant, and is a bar in any other litigation between the same parties. *Gillilan* v. *Spratt*, 8 Abb. N. S. (N. Y.) 13.

§ 11. **Effect of judgment of dismissal.** A judgment of dismissal, for any other cause than on the merits, is nothing more than one of nonsuit, and cannot support the plea of *res adjudicata*, as to any of the matters at issue. *Crews* v. *Cleghorn*, 13 Ind. 438; *Allinet* v. *Creditors*, 15 La. Ann. 130; *Dexter* v. *Clark*, 22 How. (N. Y.) 289; S. C., 35 Barb. 271; *Wheeler* v. *Ruckman*, 51 N. Y. (6 Sick.) 391; *Bond* v. *M'Nider*, 3 Ired. (N. C.) L. 440; *Cavenaugh* v. *Davis*, 7 J. J. Marsh. (Ky.) 371. See *Leese* v. *Sherwood*, 21 Cal. 151. So, a decree dismissing a bill for reasons not involving the merits, is no bar to a subsequent suit involving the same subject-matter (*Sayles* v. *Tib*

*bitts*, 5 R. I. 79; *Hughes* v. *United States*, 4 Wall. 232; *Loudenback* v. *Collins*, 4 Ohio St. 251; *Allen* v. *Blunt*, 2 Woodb. & M. 121; *Van Vliet* v. *Olin*, 1 Nev. 495; *Porter* v. *Vaughn*, 26 Vt. 624; *Nevitt* v. *Bacon*, 32 Miss. 212), but a decree dismissing a bill upon the merits is, until reversed, a bar to a new bill between the same parties for the same cause of action. *Durant* v. *Essex Co.*, 7 Wall. 107; *Black* v. *Black*, 27 Ga. 40; *Holmes* v. *Remsen*, 7 Johns. Ch. 286; *Jenkins* v. *Johnston*, 4 Jones' (N. C.) Eq. 149; *Thompson* v. *Clay*, 3 T. B. Monr. (Ky.) 359. And where, on account of its many defects, there is no equity on the face of the bill, and no relief could have been granted upon it, the dismissal of the bill will be equivalent to a judgment in bar. *Trapnall* v. *Barton*, 24 Ark. 371; *Curts* v. *Trustees of Bardstown*, 6 J. J. Marsh. (Ky.) 536. And see *Wilcox* v. *Balger*, 6 Ohio, 406.

So, it is held that a judgment dismissing a suit "agreed," is a bar to any other action for the same cause. *Jarboe* v. *Smith*, 10 B. Monr. (Ky.) 257; *Hoover* v. *Mitchell*, 25 Gratt. (Va.) 387.

§ 12. **Effect of judgment on demurrer.** It is well settled that, if the merits of a case have been once passed upon, on demurrer, the judgment is binding upon the parties in a subsequent suit, and may be pleaded in bar. *Robinson* v. *Howard*, 5 Cal. 428; *Bouchaud* v. *Dias*, 3 Denio, 238; *Gray* v. *Gray*, 34 Ga. 499; *Perkins* v. *Moore*, 16 Ala. 17; *Wilson* v. *Ray*, 24 Ind. 156; *Ferguson* v. *Carter*, 8 Ga. 524. But a judgment for the defendant, on demurrer, is not a bar to a second suit for the same cause of action, where the demurrer was sustained on account of the omission of an essential allegation in the declaration, which is supplied in the second suit. *Gould* v. *Evansville, etc., R. R. Co.*, 91 U. S. (1 Otto) 526. And see *Nickelson* v. *Ingram*, 24 Tex. 630; *Stevens* v. *Dunbar*, 1 Blackf. (Ind.) 56; *McGatrick* v. *Wason*, 4 Ohio St. 566; *Stowell* v. *Chamberlain*, 60 N. Y. (15 Sick.) 272

§ 13. **Effect of interlocutory judgment or decree.** A decree, though in form final, which is in its nature *interlocutory* merely, cannot be pleaded in bar of another action. *McLane* v. *Spence*, 11 Ala. 172; *Capell* v. *Laudano*, 34 id. 135; *Thompson* v. *Mylne*, 4 La. Ann. 206; *Quarles* v. *Kerr*, 14 Gratt. (Va.) 48. Thus, a decree cannot be regarded as final, and therefore conclusive on parties, when the amount of the execution to be issued thereon is to be ascertained by future inquiry. *Tuggle* v. *Gilbert*, 1 Duv. (Ky.) 340.

But a decision given in the progress of a case, whether right or wrong, is the law of the case in which it is given, and binding upon the parties. *Rector* v. *Danley*, 14 Ark. 304; *Cole* v. *Clarke*, 3 Wis. 323;

*Deslonde* v. *Darrington*, 29 Ala. 92; *Thomas* v. *Doub*, 1 Md. 252; *Lucas* v. *San Francisco*, 28 Cal. 591. See *post*, pp. 777, 778, §§ 19, 20.

§ 14. **Effect of judgment for a part of the demand.** Where the cause of action is the same, a former judgment in a suit between the same parties, though an *inadequate* one, is a bar to a second recovery. *Pinney* v. *Barnes*, 17 Conn. 420. So, an action brought for a part of an entire and indivisible demand, and a recovery therein, will bar a subsequent suit for the residue of the same demand. *Bendernagle* v. *Cocks*, 19 Wend. 207; *Staples* v. *Goodrich*, 21 Barb. 317; *Warren* v. *Comings*, 6 Cush. 103; *Lucas* v. *Le Compte*, 42 Ill. 303. And where a defendant offers to confess judgment for part of the plaintiff's claim, and the plaintiff enters judgment for the amount so tendered, and proceeds to execution, he cannot recover the balance of the claim. *Dodd* v. *Blackstock*, 1 Pittsb. (Penn.) Rep. 46.

But where a suit is commenced on part only of several items of a demand which are paid without the rendition of a judgment, this is not a recovery which will bar another action for the rest of the items. *Cashman* v. *Bean*, 2 Hilt. (N. Y.) 340.

§ 15. **Effect of judgment on set-off.** A defendant, on having a cross-demand against the plaintiff, may use it as a set-off, but is not bound to do so; consequently, the judgment is not conclusive on such demand, unless it was pleaded as a set-off. *Robbins* v. *Harrison*, 31 Ala. 160. See *Anderson* v. *Gregory*, 43 Conn. 61. But where a claim has been interposed in a former action, by way of set-off, and has been duly passed upon in such action, it is *res adjudicata*, and the former action is a bar to a new action by the defendant against the plaintiff in the former suit. *Smith* v. *Berry*, 37 Me. 298; *Rogers* v. *Rogers*, 1 Daly (N. Y.), 194; *Smith* v. *Smith*, 1 Rich. (S. C. Eq. 130; *Inslee* v. *Hampton*, 11 Hun (N. Y.), 156. And where a set-off was allowed, in a former action, though improperly, the judgment was held to be a bar to a subsequent action on the subject-matter of such set-off. *Thompson* v. *Wineland*, 11 Mo. 243; *M'Lean* v. *Hugarin*, 13 Johns. 184. So, a judgment against a claimant, which is a bar to another suit on the claim, is also a bar to the use by him of the same claim by way of set-off. *Jones* v. *Richardson*, 5 Metc. (Mass.) 247.

§ 16. **Effect of fraud in obtaining judgment.** Although fraud vitiates a judgment, it does not render it absolutely void. It is valid as between the parties to the fraud, and can be avoided only by a person injured by it. *Webster* v. *Reid*, 1 Morr. (Iowa.) 467. See *post*, p. 808, Art. 3, § 14.

§ 17. **Effect of error or irregularity.** The judgment of a court having jurisdiction of the parties, and of the subject-matter, is conclu-

sive, notwithstanding the record may abound with irregularities which would authorize the reversal of the judgment by a revising court. *Wells* v. *Dench*, 1 Mass. 232; *Hughes* v. *Blake*, 1 Mas. (C. C.) 515; *Thornton* v. *Campbell*, 6 Fla. 546; *Beall* v. *Pearre*, 12 Md. 550; *Town* v. *Smith*, 14 Mich. 348; *Solomon* v. *Loper*, 4 Harr. (Del.) 187; *State* v. *Hodges*, 25 Tex. 63; *Wickersham* v. *Whedon*, 33 Mo. 561; *Billings* v. *Russell*, 23 Penn. St. 189. And a judgment by confession, though not confessed in accordance with the law, is at most voidable, and not absolutely void as against creditors. *Hopkins* v. *Howard*, 12 Tex. 7; *Sheldon* v. *Stryker*, 34 Barb. 116.

§ 18. **Effect of an appeal.** According to many of the decisions, no judgment in a cause is considered as final and conclusive between parties thereto, while a review of the cause in which the judgment was rendered is pending; nor can it properly be pleaded in bar, or given in evidence as affecting the rights of the same parties in any other suit pending such review. *Haynes* v. *Ordway*, 52 N. H. 284; *McGarrahan* v. *Maxwell*, 28 Cal. 75; *Woodbury* v. *Bowman*, 13 id. 634; *Souter* v. *Baymore*, 7 Penn. St. 415; *Sherman* v. *Dilley*, 3 Nev. 21. And see *Tarbox* v. *Fisher*, 50 Me. 236; *Gallena* v. *Sudheimer*, 9 Heisk. 189; *Glenn* v. *Brush*, 3 Colo. 26, 35. But, in New York, the fact that an appeal has been taken to another court does not affect the conclusive nature of the judgment as a bar while it remains unreversed. *Harris* v. *Hammond*, 18 How. (N. Y.) 123; *Tyler* v. *Willis*, 13 Abb. Pr. 369; S. C., 35 Barb. 213. And see *Hudelmeyer* v. *Hughes*, 13 Mo. 87; *ante*, p. 768, § 3. An appeal from a judgment or decree, in which action a receiver had been appointed before the appeal was perfected, will vacate the order appointing the receiver, and the judgment, as soon as the appeal is perfected. *Allen* v. *Chadburn*, 3 Baxt. (Tenn.) 225.

§ 19. **Effect of decision on appeal.** Where an appellate tribunal reverses a judgment, and remands the cause to the court below for further proceedings, there is no final judgment which will bar a subsequent action. *Board of Education* v. *Fowler*, 19 Cal. 11; *Edgar* v. *Greer*, 10 Iowa, 279; *Ottawa* v. *Chicago, etc., R. R. Co.*, 25 Ill. 47; *Maghee* v. *Collins*, 27 Ind. 83; *Taylor* v. *Smith*, 4 Ga. 133; *Aurora City* v. *West*, 7 Wall. 82; *Borden, etc., Co.* v. *Barry*, 17 Md. 419. And where a verdict and judgment have been set aside for the purpose of a new trial, they are not, in general, evidence for any purpose in a subsequent trial of the same cause. *Delaunay* v. *Burnett*, 9 Ill. 454. The reversal of a judgment is conclusive that it was reversed, but of nothing more; and in a subsequent trial of the cause, the court is no more bound by the law declared in the former decision than it would be in a case decided between other and different parties.

*Bynum* v. *Apperson*, 9 Heisk. 632. In New York, on a second appeal, where the same facts are presented, the court will not review the grounds of the former decision to pass upon a question then involved in the case, although not suggested by counsel upon the prior argument. *Joslin* v. *Cowee*, 56 N. Y. (11 Sick.) 626. A question of law once decided in a cause is the law of the case in all subsequent proceedings therein. Ib.; *Table Mountain Co.* v. *Stranahan*, 21 Cal. 548; *Oakley* v. *Aspinwall*, 13 N. Y. (3 Kern.) 500; *Furniss* v. *Ferguson*, 34 N. Y. (7 Tiff.) 485. In case of a plain mistake, such as overlooking a statutory provision, or some controlling decision, the court will review the question. *Eaton* v. *Alger*, 47 N. Y. (2 Sick.) 345. So this may be done where the prior decision was upon a point not involved in the case, or where the new facts subvert the ground of the former judgment. *Worrall* v. *Munn*, 53 N. Y. (8 Sick.) 185, 187.

And where upon an appeal, all the parties in interest being before the court, the validity of a bond was approved, though the decree of the court below was reversed on other grounds, it was held that the validity of the bond could not again be questioned. *Corbell* v. *Zeluff*, 12 Gratt. (Va.) 226. The dismissal of an appeal for want of prosecution in the appellate court is not equivalent to an affirmance of the judgment appealed from. *Freas* v. *Engelbrecht*, 3 Colo. 377.

§ 20. **Effect of a former judgment at law upon a suit in equity.** It is a general rule, that where a matter has been once heard and determined in a court of law, it cannot be raised anew and reheard in a court of equity. *Cave* v. *Davis*, 5 T. B. Monr. (Ky.) 392; *Hooke* v. *Wood*, 3 Miss. (2 How.) 867; *Bumpass* v. *Reams*, 1 Sneed (Tenn.), 595; *Gregory* v. *Burrall*, 2 Edw. Ch. 417; *Miles* v. *Caldwell*, 2 Wall. 35. A court of equity cannot revise a judgment at law, the judgment must be held as correct until reversed in the court of appeals. *DeRiemer* v. *Cantillon*, 4 Johns. Ch. 85; *Hollister* v. *Barkley*, 11 N. H. 501; *Henderson* v. *Mitchell*, 1 Bail. (S. C.) Ch. 113; *Cameron* v. *Bell*, 2 Dana (Ky.), 328. But an adjudication that a party has no title to relief at law, does not determine his rights in equity. *Arnold* v. *Grimes*, 2 Clarke (Iowa), 1. See, also, *Blanchard* v. *Pastour*, 2 Hayw. (N. C.) 393. And when a court of law excludes all evidence of a claim of set-off offered by the defendant, and gives judgment for the plaintiff, the defendant is not estopped from pleading his set-off in a court of equity. *Hobbs* v. *Duff*, 23 Cal. 596; *Hackett* v. *Connett*, 2 Edw. Ch. 73. Where a decision at law turned upon a question of special pleading, such decision was held to be no bar to an examination of the merits in equity. *Skinner* v. *Dayton*, 19 Johns. 513. And a

judgment at law, in one of the circuit courts of the United States, is not conclusive on another circuit court of the United States, sitting as a court of equity. *Bryant* v. *Hunter*, 3 Wash. (C. C.) 48.

The general rule as stated by the court in Vermont is, that where the jurisdiction of the courts of law and equity is entirely concurrent, the adjudication of the former is conclusive upon the latter, except in the case of new matter discovered subsequently to the trial at law, or of fraud by the opposite party, or of inevitable accident or mistake. But where a party has equitable rights not cognizable in a court of law but only in equity, a court of equity will grant him relief from such adjudication. *Dunham* v. *Downer*, 31 Vt. 249. See *Hawkins* v. *Depriest*, 4 Mumf. (Va.) 469.

§ 21. **Effect of a former decree upon a suit at law.** A final decision, made by a court of equity, is conclusive of the rights of the parties, in a suit subsequently brought at law, between those who were the real parties to the suit in equity. *Pierson* v. *Catlin*, 18 Vt. 77. See *Young* v. *Harrison*, 21 Ga. 584.

But a court of equity will not review the decision of a court of law, of competent jurisdiction, and pronounce such decision erroneous. *Hempstead* v. *Watkins*, 6 Ark. 317.

§ 22. **What actions or proceedings are barred by a judgment.** A former recovery in trover, with satisfaction thereof, is a bar to an action of detinue against one claiming under the defendant, either before or after the rendition of such judgment. *Thomason* v. *Odum*, 31 Ala. 108. So a judgment in trover, not appealed from, will bar an action in assumpsit for the same goods (*Union R. R. Co.* v. *Traube*, 59 Mo. 355); and in detinue, a plea of former recovery in a statutory claim suit, averring that the plaintiff has not since acquired any title, is a bar. *Patton* v. *Hamner*, 33 Ala. 307. See, also, *Owens* v. *Rawleigh*, 6 Bush (Ky.), 656. Issues tried and determined in a replevin suit cannot be again presented in an action on the replevin bond. *Denny* v. *Reynolds*, 24 Ind. 248. So, if cross actions are commenced at the same time before different justices, judgment in one, which covers the whole subject-matter, is a bar to further proceedings in the other action, while such judgment remains in force. *Conine* v. *Scoby*, 5 N. J. Law, 510. In an action on the case, in the nature of a conspiracy for obtaining goods by false representations, a judgment on the merits is conclusive, and a bar to any new form of action (*Livermore* v. *Herschell*, 3 Pick. 33); a recovery of damages for breach of contract to employ is a bar to future actions for wages (*Booge* v. *Pacific R. R. Co.*, 33 Mo. 212; *Thompson* v. *Wood*, 1 Hilt. [N. Y.] 93); when the defendant in the suit for the price of personal property, elects to recoup his

damages by reason of a breach of the warranty given at the sale, a decision against him in that form will be a bar to another action brought upon the warranty. *Timmons* v. *Dunn*, 4 Ohio St. 680. A judgment on a note lost after maturity is a complete bar to another action brought by any person who should receive it after maturity (*Elliott* v. *Woodward*, 18 Ind. 183); a judgment in a suit for the recovery of land in which the plaintiff also sets up a claim for rents and profits, is a conclusive bar to another and separate action brought for the recovery of such rents and profits (*Walker* v. *Mitchell*, 18 B. Monr. [Ky.] 541); where a recovery has been had in an action upon a contract, a second suit cannot be maintained for the non-payment of the money due on such contract at the time stipulated (*Nolte* v. *Lowe*, 18 Ill. 437); a judgment for the defendant, in an action of tort for a false representation on soundness on an exchange of horses, is a bar to a subsequent action on contract on the defendant's promise, at the time of the exchange, that his horse was sound (*Norton* v. *Doherty*, 3 Gray, 372); when a proceeding by attachment for contempt is instituted as a means of private redress, and results in satisfaction, it may be pleaded in bar of a subsequent action of trespass between the same parties, and founded on the same subject-matter (*Walker* v. *Fuller*, 29 Ark. 448); where a motion to set aside a judgment is overruled, the judgment founded thereon, so long as it remains unrevoked, or is not shown to be void, is a bar to any further proceedings to set aside the original judgment (*Grier* v. *Jones*, 54 Ga. 154); and the principle of *res adjudicata* has been held to be applicable to *habeas corpus* proceedings (*People* v. *Burtnett*, 13 Abb. Pr. [N. Y.] 8; S. C., 5 Park. 113); and indeed the principle of the doctrine of *res adjudicata* may be properly applied to all adjudications before courts and officers, upon issues properly before them for decision. *Matter of Thomas*, 10 Abb. N. S. (N. Y.) 114; *Matter of Rosenberg*, id. 450.

It has been held that a recovery in replevin is no bar to a subsequent action of trover by the defendant in replevin. *Robinson* v. *Kruse*, 29 Ark. 576. So, merely bringing trover, by the bailor for hire against the bailee, does not effect a rescission of the contract, where the bailee prevails on the merits, nor does it bar a subsequent action to recover for the use of the thing hired (*Deens* v. *Dunklin*, 33 Ala. 47); and a recovery in an action for the hire of a horse, buggy and harness, is not a bar to another action for injuries done to the buggy and harness while in the possession of the bailee (*Shaw* v. *Beers*, 25 Ala. 449); so, a judgment in an action of assumpsit, against a bailee, for a breach of his contract to transport and deliver the property bailed, in which the owner has recovered damages for the value of his property, without

satisfaction, is no bar to an action of trover against a third person, who has purchased the property of the bailee. *Hyde* v. *Noble*, 13 N. H. 494. A recovery in one action of covenant is no bar to another on the same instrument, claiming for another and distinct breach (*Merchants' Ins. Co.* v. *Algeo*, 31 Penn. St. 446); a judgment in trespass is not a bar to an ejectment where the title was not actually in issue in the trespass suit (*Hargus* v. *Goodman*, 12 Ind. 629); a judgment in a suit, where the ownership of a pew is claimed will not bar another action, in which the use only of the pew is claimed (*Contrelle* v. *Roman Cath. Cong.*, 16 La. Ann. 442); the entry of a decree of foreclosure and the sale of mortgaged premises does not bar another action of foreclosure upon a prior mortgage of the same premises (*Bache* v. *Purcell*, 51 How. [N. Y.] 270); and where a note and a mortgage to secure it are executed at the same time, a judgment against the validity of the mortgage will not be *per se* a bar to a suit upon the note. *Leander* v. *Arno*, 65 Me. 26.

A judgment in a court of admiralty upon a libel by a mariner against the master for assault, battery and imprisonment, upon the high seas, is no bar to an action at common law for the same torts, alleged to have been committed on shore, in a foreign port during the voyage. *Adams* v. *Haffards*, 20 Pick. 127. And a decree in a suit in admiralty brought by a master to recover his wages, holding that the master had deserted his vessel and had thereby forfeited his entire wages, is no bar to a common-law action to recover for the same services. *Murphy* v. *Granger*, 32 Mich. 358. See, also, *Granger* v. *Judge of Wayne County*, 27 id. 406; S. C., 15 Am. Rep. 195.

Judgment in an action of book debt is no bar to an action on a bond (*Chapman* v. *Brainard*, 2 Root [Conn.], 375); but if a note is sued and the defendant claims that he has paid certain sums on the note, and this is found against him by the verdict of a jury, he cannot maintain an action on book to recover for such payment. *Peach* v. *Mills*, 14 Vt. 371. A judgment against a bank in a suit upon the teller's bond is no bar to a subsequent action for money had and received by him for the use of the bank. *Bank of the United States* v. *Johnson*, 3 Cranch (C. C.), 228. Nor is a judgment in favor of the claimant, on a trial of the right of property in goods seized on execution, a bar to an action for the tort committed by taking the property under such execution. *Lenoir* v. *Wilson*, 36 Ala. 600. Nor is a judgment against the plaintiff in an action on the case for deceit a bar to another action founded on a contract for good consideration, in regard to the same subject-matter, not involving the charge of deceit. *Salem India Rubber Co.* v. *Adams*, 23 Pick. 256. Nor, in an action for damages for injuries arising from negligence, is it a defense that the plaintiff has

recovered a judgment against another person for the same injury, unless it is shown that the plaintiff has received satisfaction from him. *Wies* v. *Fanning*, 9 How. (N. Y.) 543. And a determination of the surrogate upon the effect of an instrument does not preclude the supreme court from entertaining an application to reform the instrument. *Saltus* v. *Pruyn*, 18 How. (N. Y.) 512.

A judgment in trespass against one for removing a gate from across a lane was held not to bar his action of case against such judgment plaintiff for obstructing the lane by putting the gate up again. *Connery* v. *Brooke*, 73 Penn. St. 80. But where an action against a railway company for damages in consequence of its failure to provide a crossing had resulted for the defendant, it was held that another action could not be maintained to compel it to provide a crossing. *Bettys* v. *Chicago, etc., R. R. Co.*, 43 Iowa, 602.

§ 23. **What defenses are barred by a judgment.** A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction. See *Bendernagle* v. *Cocks*, 19 Wend. 207; *Rockwell* v. *Langley*, 19 Penn. St. 502; *Atwood* v. *Robbins*, 35 Vt. 530; *Collins* v. *Jennings*, 42 Iowa, 447. Thus, a judgment for one installment of the purchase-money prevents the defendant from setting up the same defense to a suit for another installment. *French* v. *Howard*, 14 Ind. 455. So, in a suit at law for the recovery of interest on certain bonds issued by a town, judgment was recovered against the town, and it was held in a second suit between the same parties, on other bonds of the same issue, that the town was estopped by the prior judgment from setting up the invalidity of the issue. *Beloit* v. *Morgan*, 7 Wall. 619. So, a promisor, sued for interest due on his note, defended on the ground of fraudulent alteration, and judgment was rendered against him. Such judgment was held to conclude the promisor from setting up the same defense to an action on the note itself. *Edgell* v. *Sigerson*, 26 Mo. 583. A judgment in trespass, upon a traverse of the plea of *liberum tenementum*, estops the party against whom it has been rendered, and his privies, from afterward controverting the title to the same freehold in a subsequent action of trespass. *Stevens* v. *Hughes*, 31 Penn. St. 381. And when a purchaser at a mortgage sale has moved to set aside an order of confirmation of the sale, made without notice to him, and his motion is overruled, he cannot, as a defense to an action for the purchase-money, set up the matters relied on in the motion. *Mayer* v. *Wick*, 15 Ohio St. 548.

It has, however, been held that where the maker of two promissory notes, who has a valid defense common to both of them, allows judg-

ment to be taken by default in an action upon one of the notes, he is not thereby precluded from setting up such defense in an action upon the other. *Hughes* v. *Alexander*, 5 Duer (N. Y.), 488.

§ 24. **In what actions a former judgment is conclusive.** A former judgment in a civil action is not conclusive in a penal action between the same parties, though the same question is litigated. *Riker* v. *Hooper*, 35 Vt. 457. And a judgment rendered in a criminal prosecution is not admissible as evidence in a civil cause, although the same questions of fact may be in issue in both. *Jarvis* v. *Manlove*, 5 Harr. (Del.) 452; *Betts* v. *New Hartford*, 25 Conn. 180. It is not however necessary, in order to make a judgment conclusive, that the cause of action should be the same in the first suit as that in which the judgment is pleaded or relied upon in bar. But it is essential that the issue should be the same. *Merriam* v. *Whittemore*, 5 Gray, 317; *Love* v. *Waltz*, 7 Cal. 250; *Doty* v. *Brown*, 4 N. Y. (4 Comst.) 71; *Lynch* v. *Swanton*, 53 Me. 100; *Howard* v. *Kimball*, 65 id. 308. See *Whitehurst* v. *Rogers*, 38 Md. 503. Where a grantee has been evicted by virtue of a judgment recovered against him, and the grantor had notice of that suit, and an opportunity to appear and defend, such judgment is evidence against him, in a suit by the grantee upon his covenants, to prove the title of the party recovering. *Hardy* v. *Nelson*, 27 Me. 525. A former recovery in an action of ejectment, in which action the question in controversy was the location of the boundary line between the parties, is conclusive in a subsequent action of trespass *quare clausum fregit* between the grantee of the plaintiff in the ejectment suit and a person claiming title through the defendant in that suit as a privy. *Beebe* v. *Elliott*, 4 Barb. 457; *Cagger* v. *Lansing*, 4 Hun, 812; 64 N. Y. (19 Sick.) 417. So, a verdict against the defendant in an action of *quare clausum fregit*, on the title put in issue by him under the general issue, estops him in a subsequent action by the same parties to try the title, from disputing the title of the plaintiff. *Shettlesworth* v. *Hughey*, 9 Rich. (S. C.) 387. And see *Parker* v. *Leggett*, 13 id. 171. And a judgment for the tenant in a writ of entry is conclusive evidence of the title, in a subsequent action of trespass by the demandant against the tenant for breaking and entering the same close, but is no bar to such an action. *Stevens* v. *Taft*, 8 Gray, 419. In a suit on a recognizance entered in an attachment suit, the regularity of the judgment in the attachment suit cannot be inquired into (*Eimer* v. *Richards*, 25 Ill. 289), so, in a suit upon an appeal bond, the validity of the judgment which has been affirmed on appeal cannot be questioned (*Sturgis* v. *Rogers*, 26 Ind. 1), and where an assessment was held to be valid on *certiorari*,

the judgment was held to be final and conclusive in a suit to recover the assessment between substantially the same parties. *North River Meadow Co.* v. *Shrewsbury Church*, 22 N. J. Law, 424. Judgment for a quarter's rent under a lease is conclusive evidence, so far as it goes, in an action of forcible entry for non-payment of another quarter's rent, under the same lease, between the same parties. *Love* v. *Waltz*, 7 Cal. 250. See *Mitchell* v. *Davis*, 23 id. 381.

In an action on the case at common law, to recover damages for flowing land by means of a dam, the verdict and judgment in a prior suit, in which damages were recovered for the same thing, cannot be pleaded as an estoppel, or given in evidence to establish the injury. *Burwell* v. *Cannaday*, 3 Jones' (N. C.) L. 165. And see *Kidd* v. *Laird*, 15 Cal. 161; *McDonald* v. *Bear River, etc., Co.*, id. 145; *Shepherd* v. *Willis*, 19 Ohio, 142. So, the judgment in a case of forcible entry and detainer is held to be no evidence of any right in the plaintiff to recover in an action for *mesne* profits. *Casey* v. *McFalls*, 3 Sneed (Tenn.), 115. And in a suit against a prior, by a subsequent indorser, a previous judgment, in a suit brought by a subsequent holder, cannot be used as an estoppel, nor even as evidence. *Barker* v. *Cassidy*, 16 Barb. 177.

§ 25. **How far conclusive.** In a second action for a continued trespass, the former verdict and judgment is evidence, but not conclusive evidence of title. *Nivin* v. *Stevens*, 5 Harr. (Del.) 272. So, it is stated as a general rule, that, in actions of trespass, or for torts generally, nothing is *conclusively* settled by verdict and judgment, except the points put directly in issue. *Standish* v. *Parker*, 2 Pick, 20; *Parker* v. *Standish*, 3 id. 288. And see *Richardson* v. *Boston*. 19 How. (U. S.) 263. But see *Whitehurst* v. *Rogers*, 38 Md. 503. And that a former recovery between the same parties, although not an absolute bar to another suit, may yet be conclusive upon some of the matters involved in such subsequent suit. See *Christian* v. *Penn*, 7 Ga. 434; *Bell* v. *Raymond*, 18 Conn. 91.

§ 26. **What matters are concluded by the judgment.** The judgment of a court of competent jurisdiction upon a point litigated between the parties is, in general, conclusive in all subsequent controversies when the same matter comes directly in question (*Hutchinson* v. *Dearing*, 20 Ala. 798; *Warwick* v. *Underwood*, 3 Head [Tenn.], 238; *Demarest* v. *Darg*, 32 N. Y. [5 Tiff.] 281; *ante*, p. 767, § 2); or, as the doctrine is otherwise expressed, any matter regularly determined, in whatever form, by a competent tribunal, is not open to inquiry in any other proceeding between the same parties. *Hyatt* v. *Bates*, 35 Barb. 308; S. C. affirmed, 40 N. Y. (1 Hand) 164; *Babcock* v. *Camp*,

12 Ohio St. 11. Thus, it is held that the party, against whom a judgment was rendered, is estopped from contesting, in the proceeding for a *mandamus*, to enforce the same, the validity of the instruments upon which the judgment was based. *State* v. *Beloit*, 20 Wis. 79. And see further illustrations of the general doctrine. *Ante*, pp. 768, 770, §§ 3, 4.

§ 27. **It must be matters at issue and decided.** As a general rule, a former judgment will not be a bar to further litigation, unless the same vital point was put directly in issue and determined (*Howard* v. *Kimball*, 65 Me. 308; *Gibson* v. *McNeely*, 11 Ohio St. 131; *Palmer* v. *Russell*, 43 N. H. 625); or was fairly within the scope of the pleadings. *Petersine* v. *Thomas*, 28 Ohio St. 596; *Driscoll* v. *Damp*, 16 Wis. 106; *People* v. *San Francisco*, 27 Cal. 655; *Aurora City* v. *West*, 7 Wall. 82. See *ante*, p. 771, § 5.

§ 28. **Its effect as to matters not at issue, nor decided.** It follows from the rule stated in the preceding section, that a judgment or decree is not conclusive as to collateral questions (*Land* v. *Keirn*, 52 Miss. 341; *Western Minn. & Manuf. Co.* v. *Virginia Canal Coal Co.*, 10 W. Va. 251), nor of any matter to be inferred by argument from the judgment. *Tams* v. *Lewis*, 42 Penn. St. 402; *Matthews* v. *Duryee*, 45 Barb. 69; S. C., 17 Abb. Pr. 256; S. C. affirmed, 3 Abb. Ct. App. 220; *Hobbs* v. *Parker*, 31 Me. 143; *Dickinson* v. *Hayes*, 31 Conn. 417; *Shall* v. *Biscoe*, 18 Ark. 142. And see *ante*, p. 767, § 2. The rule as sometimes stated is, that a judgment is not technically conclusive of any matter, if the matter is not such that it had of necessity to be determined before the judgment could have been given. *Niday* v. *Harvey*, 9 Gratt. (Va.) 454; *Hunter* v. *Davis*, 19 Ga. 413; *Church* v. *Chapin*, 35 Vt. 223; *Packett Co.* v. *Sickles*, 5 Wall. (U. S.) 580. And it has been frequently held that a defendant pleading a previous judgment must show that the cause of action was the same. *Cummings* v. *Colgrove*, 25 Penn. St. 150; *Smalley* v. *Edey*, 19 Ill. 207; *Eaton, etc., R. R. Co.* v. *Hunt*, 20 Ind. 457; *Dunlap* v. *Edwards*, 29 Miss. 41; *Campbell* v. *Butts*, 3 N. Y. (3 Comst.) 173. See *ante*, p. 770, § 4. But the weight of American authority sustains the principle that the judgment of a court of competent jurisdiction, directly upon a particular point, is, as between the parties, conclusive in relation to such point, though the purpose and subject-matter of the two suits be different. Hence, a judgment may not only be evidence, but conclusive evidence in relation to such point, and still be no bar, technically speaking, to a second action. *Spencer* v. *Dearth*, 43 Vt. 98; *Cannon* v. *Brame*, 45 Ala. 262; *Betts* v. *Starr*, 5 Conn. 550. See *ante*, p. 783, § 24. A judgment upon a writ of error sued out by one of the parties is no bar to

a subsequent writ of error at the suit of the other party, on which different errors are assigned. *Ormsby* v. *Ihmsen*, 34 Penn. St. 462. Nor is relief on *habeas corpus* to be refused in a proper case, upon the ground that upon a prior writ issued by another judge, relief has been refused, if it appears upon the second application that essentially different facts are involved from those which were presented on the first application. *People* v. *Kelly*, 1 Abb. Pr. (N. S. N. Y.) 432. And a decision upon a point not actually raised in the case, made under a mistake of the facts, is not binding upon the same parties in another suit. *Garrett* v. *Day*, 2 McCord's (S. C.) Ch. 27. But see *Street* v. *Beckman*, 43 Iowa, 496.

If the testimony offered in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of the plaintiff in the first suit is no bar to his recovery in the other suit, although it is for the same cause of action for which he attempted to recover in the first suit. *Kirkpatrick* v. *Stingley*, 2 Ind. 269; *Indianapolis, etc., R. R. Co.* v. *Clark*, 21 id. 150. And see *Guest* v. *Warren*, 26 Eng. L. & Eq. 381; 9 Exch. 379.

§ 29. **Its effect as to matters that might have been decided.** The principle, that whenever a matter is adjudicated and finally determined by a competent tribunal, it is considered as forever at rest, embraces not only what was actually determined, but it extends to every other matter which, under the issues, might have been litigated and decided in the suit. *Danaher* v. *Prentiss*, 22 Wis. 311; *Parkhurst* v. *Summer*, 23 Vt. 538; *Chesapeake, etc., Co.* v. *Gittings*, 36 Md. 276; *Phelan* v. *Gardner*, 43 Cal. 306; *Petersine* v. *Thomas*, 28 Ohio St. 596; *Barth* v. *Burt*, 43 Barb. 628; 17 Abb. Pr. 349. But when it is said that a judgment is final and conclusive upon the parties to it, as to all matters which might have been litigated and decided in the action, the expression must be limited, as applicable to such matters only as might have been used as a defense in that action against an adverse claim therein; such matters as, if *now* considered, would involve an inquiry into the merits of the former judgment. *Malloney* v. *Horan*, 49 N. Y. (4 Sick.) 111; S. C., 12 Abb. (N. S.) 289; 10 Am. Rep. 335; *Whitcomb* v. *Williams*, 4 Pick. 228; *King* v. *Chase*, 15 N. H. 13. See *ante*, p. 767, § 2. A payment on a promissory note is lost to the payee if he suffers a judgment against him for the face of the note without setting up such payment. *Binck* v. *Wood*, 43 Barb. 315; *Hagar* v. *Springer*, 60 Me. 436; *Jordan* v. *Phelps*, 3 Cush. 545; *Wright* v. *Leclaire*, 3 Iowa, 221; *Bobe* v. *Stickney*, 36 Ala. 482. So, it is held that where the defendant sets up a counter-claim exceeding the plaintiff's demand, and succeeds in his defense, but does not

pray for, or obtain judgment for the excess of his counter-claim over the plaintiff's claim, he cannot sue for such excess in a separate action. If he does, the judgment in his favor in the first action is a bar to the second. *Inslee* v. *Hampton*, 11 Hun (N. Y.), 156.

§ 30. **Its effect as to matters admitted by default.** See *ante*, p. 771, § 6. A judgment by default is no estoppel upon a distinct cause of action, though the material issues of fact are precisely the same in both cases. *Van Alstyne* v. *Indiana, etc., R. R. Co.*, 21 How. (N. Y.) 175; S. C., 34 Barb. 28.

§ 31. **Its effect as to matters arising subsequent to judgment.** It is now well settled that a former judgment constitutes no defense to a cause of action accruing between the same parties, and upon the same subject-matter, after the rendition of such judgment (*Staple* v. *Spring*, 10 Mass. 72; *Rogers* v. *Ratcliff*, 3 Jones [N. C.], 225; *McFarlane* v. *Cushman*, 21 Wis. 401; *Smith* v. *Elliott*, 9 Penn. St. 345; *Smith* v. *McCluskey*, 45 Barb. 610; *Jones* v. *Petaluma*, 36 Cal. 231); as where the second litigation is in relation to a title acquired since the first suit. *Woodbridge* v. *Banning*, 14 Ohio St. 328; *McKissick* v. *McKissick*, 6 Humph. (Tenn.) 75. It follows that parol evidence is admissible to show that the demand in the second suit was not recovered for in the first. *Marcellus* v. *Countryman*, 65 Barb. 201. And see *Bottorff* v. *Wise*, 53 Ind. 32; *Miles* v. *Caldwell*, 2 Wall. (U. S.) 35. Thus in an action to recover the price of goods sold, a former judgment in favor of the defendants in an action to recover the price of the same goods was set up in defense. It appeared by extrinsic evidence that in the former trial there was uncontradicted testimony that the time of credit upon which the goods were sold had not expired at the time the action was brought, and that no other question was argued, and it did not appear that the judgment was founded upon any other ground, and it was held that such judgment was not a bar to the action. *Wilcox* v. *Lee*, 26 How. (N. Y.) 418; S. C., 1 Abb. (N. S.) 250; 1 Robt. 355.

## ARTICLE II.

### WHO ARE BOUND BY A FORMER ADJUDICATION.

**Section 1. In general.** To render a former adjudication a bar, it must appear that the litigation was between the same parties or their privies (*Phipps* v. *Tarpley*, 24 Miss. 597; *Hudson* v *Smith*, 7 Jones & Sp. [N. Y.] 452; *Finney* v. *Boyd*, 26 Wis. 366; *Tracy* v. *Merrill*, 103 Mass. 280; *Chase* v. *Swain*, 9 Cal. 130); and the judgment in a

former suit is not evidence, unless between parties and privies. *Burton* v. *Hazzard*, 4 Harr. (Del.) 100. See *ante*, p. 767, Art. 1, § 2. So, a judgment is conclusive as an estoppel only between the same parties, and where the parties are mutually bound. *Myers* v. *County of Johnson*, 14 Iowa, 47. But in order that a judgment may be pleaded as an estoppel, it is not necessary that precisely the same parties were plaintiffs and defendants in the two suits, provided the same subject in controversy between two or more of the parties, plaintiffs and defendants, to the two suits respectively, has been in the former suit directly in issue and decided. *Western Min. & Manuf. Co.* v. *Virginia Cannel Coal Co.*, 10 W. Va. 250.

§ 2. **Who are parties or privies.** One who, though not technically a party, defends or prosecutes an action by employing counsel, paying costs, and doing those things which are usually done by a party, will be bound by a judgment rendered therein. *Stoddard* v. *Thompson*, 31 Iowa, 80. The term "parties" includes all persons who are directly interested in the subject-matter in issue, who have a right to make defense, control the proceedings, or appeal from the judgment. Strangers are persons who do not possess these rights. *Cecil* v. *Cecil*, 19 Md. 72; *Spencer* v. *Dearth*, 43 Vt. 98; *Peterson* v. *Lothrop*, 34 Penn. St. 223; *Castle* v. *Noyes*, 14 N. Y. (4 Kern.) 329; *Conger* v. *Chilcote*, 42 Iowa, 18; *Hunt* v. *Haven*, 52 N. H. 162. And parties are not only bound by a judgment, but their privies are equally concluded by the same proceedings; and by privies are meant persons who are represented by the parties, and claim under them, or in privity with them, who have mutual or successive relationship to the same right or thing. Id.; *Goddard* v. *Benson*, 15 Abb. Pr. (N. Y.) 191. And see *Manly* v. *Kidd*, 33 Miss. 141; *Johnson* v. *Weld*, 8 La. Ann. 126. When a statute makes provision that the estate of a party, not named as a party to a judgment, may be taken to satisfy such judgment, and it is taken, he becomes a privy in law to that judgment. *Merrill* v. *Suffolk Bank*, 31 Me. 57. But it is held that one cannot be a privy in estate to a judgment or decree, unless he derives his title to the property in question subsequent to, and from some party who is bound by such judgment or decree. *Hunt* v. *Haven*, 52 N. H. 162.

In the effect it gives to *res judicata*, the law makes no distinction between corporations and natural persons. *Louisiana State Bank* v. *Orleans Nav. Co.*, 3 La. Ann. 313. A judgment against a county or its legal representatives, in a matter of general interest to all the people thereof, is binding, not only on the official representatives of the county named in the proceeding as defendants, but upon all the citizens thereof, though not made parties defendant by name. *Clark* v. *Wolf*,

29 Iowa, 197. But a judgment against a railroad corporation is not binding on a public receiver of the road, nor even evidence against him. *Hopkins* v. *Connel*, 2 Tenn. Ch. 323.

Judgment for the defendant upon the merits in a suit, prosecuted in the name of the wife alone to recover property belonging to her, is a bar to a second suit brought in the name of the husband and wife for the same subject-matters. *Hawkins* v. *Lambert*, 18 B. Monr. (Ky.) 99.

The recital in the body of a decree, that it was made "with the consent of all the parties," only binds those who are "parties" to the suit; it does not affect the rights of others not made parties to the suit, but who should have been. *Dibrell* v. *Carlisle*, 51 Miss. 785, 787.

§ 3. **Parties not served with process or notice.** In general, either a citation or actual appearance is indispensable to affect a party by judicial proceedings, except when the law has declared advertisements of notice equivalent to citation. *Augusta Ins. Co.* v. *Packwood*, 9 La. Ann. 74. See, also, *Borden* v. *Fitch*, 15 Johns. 140; *Ferguson* v. *Crawford*, 70 N. Y. (25 Sick.) 253; *Conger* v. *Chilcote*, 42 Iowa, 18; *Allen* v. *Blunt*, 1 Blatchf. (C. C.) 487; *Gray* v. *Larrimore*, 2 Abb. (U. S.) 542. But the finding of the court, as to proper notice having been given or process served, is *prima facie* sufficient to establish the fact (see id.), and would not be disregarded without very clear and satisfactory proof to the contrary. *Goudy* v. *Hall*, 30 Ill. 109. And under some circumstances, a defendant who has by his own act, or by the act of one whom he admits to have been his attorney, recognized the validity of a service on him through his agent, cannot afterward object to the jurisdiction. *Baker* v. *Kerr*, 13 Iowa, 384. So, a party not properly summoned, who does not object on that account, but afterward pleads and goes to trial on the merits, thereby waives the objection. *Lowe* v. *Stringham*, 14 Wis. 222.

If, by reason of a recovery by A against B, B has a remedy over against C, it is not necessary to support an action by B against C, that C should have had notice of the suit by A against B. With notice, the recovery in the former suit is conclusive on C; without it, only *prima facie* evidence of liability. *Napier* v. *Neal*, 3 Ga. 298.

If one carrier is sued for the loss of goods, and notifies a second carrier, to whom he delivered the same for transportation, of the pendency of the suit, and requires him to defend, the judgment against the first is not conclusive as to the question of the liability of the second. It is only conclusive on such privies as are liable over, and then only as to the fact that the judgment was recovered, and that it was for the value of the goods lost; but the judgment is not so far

conclusive of the question of privity as to fix the liability of the person served with notice. *Chicago, etc., R. R. Co.* v. *Northern Line Packet Co.*, 70 Ill. 217.

§ 4. **Parties not properly named.** Under a plea of former recovery, a variance between the names of *Adamson* and *Adanson* was held to be immaterial, the principle of *idem sonans* being applicable to the case. *James* v. *State*, 7 Blackf. (Ind.) 325. But a suit by J. L. against M. on an account originally due to S. M., which was rejected by the justice, because suit was not brought by the legal party, was held to be no bar to a subsequent suit by S. M., for the use of J. L. *Miller* v. *Langworthy*, 3 Iowa, 347.

In *Keech* v. *Baltimore, etc., R. R. Co.*, 17 Md. 32, the defendant appeared and made no objection on account of a misnomer, and it was held that the misnomer could be cured by amendment, and must be so cured in order to render the judgment available.

§ 5. **New parties brought in.** New parties may be made to a suit in equity after a decree, by a supplemental bill, without joining the parties to the original bill. The decree in such case does not bind the new parties, but is open to any objection which might have been made at the first hearing. *Stewart* v. *Duvall*, 7 Gill & J. (Md.) 179.

Under the New York practice, a plaintiff is not compelled to bring in any party who has succeeded to the rights of the defendant *pendente lite*. In case of death, marriage, or other disability, he may continue the suit, by motion, against the personal representative or successor in interest; but in other cases the action continues in the name of the original party, and the other is bound by the judgment if a privy, or the court may allow such new person in interest to be substituted. *Voorhees* v. *Seymour*, 26 Barb. 569.

§ 6. **Effect upon assignees.** See *ante*, p. 788, § 2. The assignee of a litigated right cannot claim to be a stranger to the suit pending. *Bisland* v. *Griffin*, 9 La. Ann. 150; *Adams* v. *Preston*, 22 How. (U. S.) 473; *Gill* v. *United States*, 7 Ct. of Claims, 522. Where a mortgage has been declared void in a suit to foreclose it, between the original parties thereto, the decree in such suit is conclusive against a subsequent assignee of the mortgage, in an action of ejectment wherein he claims to recover by virtue of the same mortgage. *Smith* v. *Kernochen*, 7 How. (U. S.) 198. But it was held, that where a sale of land is set aside as fraudulent in an action by the creditors of the vendor, an assignee of notes given in consideration for the land, who is not made a party to the action, is not concluded by the judgment, but may enforce his lien on the land against a purchaser at the decretal sale to the extent of the consideration actually paid for such notes.

*Doyle* v. *Armstrong*, 2 Duv. (Ky.) 534. So, a decree in a suit between husband and wife, confirming a conveyance of real estate made to her by him, does not bind his assignee in bankruptcy, suing to set such conveyance aside on the ground that it was made in fraud of creditors. *Humes* v. *Scruggs*, 94 U. S. (4 Otto) 22. And where in an action of replevin the plaintiff, who had obtained possession of the goods, failed to recover, but the defendant did not entitle himself to judgment for a return, the defendant's assignee can maintain a subsequent action against the plaintiff to recover the same goods; and the plaintiff, as defendant in the present action, is precluded from setting up his title. *Angel* v. *Hollister*, 38 N. Y. (11 Tiff.) 378.

§ 7. **Effect on purchasers.** It is a well-established principle in equity, that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset. *Inloe's Lessee* v. *Harvey*, 11 Md. 519; *Snowman* v. *Harford*, 62 Me. 434; *Salisbury* v. *Morss*, 7 Lans. (N. Y.) 359; S. C. affirmed, 55 N. Y. (10 Sick.) 675; *Tilton* v. *Cofield*, 93 U. S. (3 Otto) 163. Thus, a purchaser of property, *pendente lite*, for a valuable consideration, and without any notice in point of fact, either express or implied, of property actually in litigation, is affected in the same manner as if he had notice, and will be bound by the judgment or decree in the suit. *National Bank* v. *Sprague*, 21 N. J. Eq. 530; 1 Story's Eq. Jur., § 405. And see *Thurston* v. *Spratt*, 52 Me. 202; *Bradley* v. *McDaniel*, 3 Jones' (N. C.) L. 128; *Boulden* v. *Lanahan*, 29 Md. 200; *Commonwealth* v. *Dieffenbach*, 3 Grant's (Penn.) Cas. 368; *Haynes* v. *Calderwood*, 23 Cal. 409; *Green* v. *White*, 7 Blackf. (Ind.) 242; *Shotwell* v. *Lawson*, 30 Miss. 27; *Masson* v. *Saloy*, 12 La. Ann. 776. A judgment, though by consent, and though the defendant waived a sufficient defense, as fraud or usury, is binding and conclusive upon a purchaser, from the defendant, of the subject of the suit, with notice of the judgment. *French* v. *Shotwell*, 5 Johns. Ch. 555; S. C. affirmed, 20 Johns. 668. A judgment for the plaintiff, in an action of trespass *de bonis asportatis*, brought in the name of one who owned the goods at the time of the trespass, but for the benefit, and by the authority, of a vendee of the goods, is a bar to a subsequent action for the same cause by the vendee. *Boynton* v. *Willard*, 10 Pick. 166.

The rule of *lis pendens* above stated is a hard one, not a favorite of the courts, and a party claiming the benefit of it must clearly bring his case within it. *Sorrell* v. *Carpenter*, 2 P. Wms. 482; *Hayden* v. *Bucklin*, 9 Paige, 512. To bind a purchaser *pendente lite* by the judgment, there must also be a bill or complaint on file at the time of

his purchase, in which the claim upon the property is set forth. Id.; *Leitch* v. *Wells*, 48 N. Y. (3 Sick.) 585. And in New York, as it regards real estate, the pendency of a suit is not notice to a stranger until the notice of *lis pendens* is actually filed in the clerk's office of the county where the land is situated, and one, having no actual notice, may, in good faith, and for a good consideration, acquire a good title, until such notice is filed. Id.

A judgment creditor is not, as such, in privity with the debtor, and notice of the judgment will not affect a *bona fide* purchaser, from the debtor, of a chose in action not bound by the judgment. *Grosvenor* v. *Allen*, 1 Clarke (N. Y.), 275. And a subsequent purchaser, for valuable consideration, without actual notice, is not affected by a suit pending to foreclose a mortgage not duly recorded. *Newman* v. *Chapman*, 2 Rand. (Va.) 93.

In Louisiana, a judgment declaring a sale of property under an execution a nullity, is not *res judicata* as to the purchaser who was not a party to the suit. The purchaser is, therefore, legally entitled to the rents of such property until his title is declared null and void by judicial proceedings to which he is a party. *Peters* v. *Spitzfaden*, 24 La. Ann. 111.

§. 8. **Effects in suits brought by or against agents or attorneys.** An action by an agent in his own name for a conversion, in which the jury found the title in the principal, and therefore gave the agent nominal damages, is no bar to an action by the principal. *Pico* v. *Webster*, 12 Cal. 140. An agent, having property of his principal in his possession, and being sued for such property, had judgment rendered against him. The principal had knowledge of the suit, and took part in the defense, and he was held to be bound by the judgment. *Warfield* v. *Davis*, 14 B. Monr. (Ky.) 33. So where, in replevin for property in the hands of an agent, the defendant pleads property in his principal, who appears on the trial and litigates the case, and the plaintiff obtains a verdict, the principal is concluded from disputing the title of the plaintiff in a subsequent action against the principal. *McKinzie* v. *Baltimore, etc., R. R. Co.*, 28 Md. 161.

A judgment on the merits against a master, in an action of trespass, for the act of his servant, is a bar to an action against the servant for the same act, though such judgment was not rendered till after general issue pleaded to the action against the servant (*Emery* v. *Fowler*, 39 Me. 326); and parol evidence is admissible to show that the same matter is in controversy in both actions. Id.; *Rogers* v. *Libbey*, 35 id. 200.

But in a suit by A against B for work done at the employment of B's agent, a judgment of B against the agent is no evidence against A. *Middleton* v. *Kansas City, etc., R. R. Co.*, 62 Mo. 579.

§ 9. **Judgments by or against executors or administrators.** In accordance with the general doctrine as to privies (see *ante*, pp. 788, 789, §§ 2, 3), an executor, administrator, or assignee, is bound by a judgment against his principal. *Chapin* v. *Curtis*, 23 Conn. 388. And a decree against the heirs-at-law may be pleaded in bar of any suit brought by the administrator for their benefit, there being no debts owing by the intestate. *Hardaway* v. *Drummond*, 27 Ga. 221. So, the administrator is the legal party, who, as to all the world, represents the estate, and a judgment against him is just as conclusive against the estate he represents as a judgment against any other defendant is against him. *Castellaw* v. *Guilmartin*, 54 Ga. 299. If the title to real estate of the deceased is put in issue and determined in an action between the administrator and another, the judgment will bind the heir to the same extent that it binds the administrator. *Meeks* v. *Vassault*, 3 Sawyer (C. C.), 206.

But a judgment recovered by an executor is no bar to an action for the same cause by an administrator *de bonis non* (*Grout* v. *Chamberlin*, 4 Mass. 613); and a judgment against the administrator *de bonis non*, of a debtor, is no evidence of the debt as against the representative of the administrator-in-chief. *Thomas* v. *Sterns*, 33 Ala. 137. See *Manigault* v. *Deas*, 1 Bailey's (S. C.) Ch. 283; *Payne* v. *Payne*, 29 Vt. 172.

The general rule that a judgment of a court having jurisdiction of the subject-matter and the parties and the process, and rendered directly upon the point in question, is conclusive between the same parties, has no application where the same person, though a party in both suits, is such in different capacities; in the one individually, in the other as administrator. *Lander* v. *Arno*, 65 Me. 26.

§ 10. **Judgments by or against heirs, devisees, legatees, etc.** A judgment against the ancestor, in his life-time, only binds the heir, when it cannot be paid out of the personal estate of the ancestor. *Rogers* v. *Denham*, 2 Gratt. (Va.) 200. There being no privity between the real and the personal representatives of a deceased person, a judgment against an administrator or executor is never conclusive against the heirs or devisees (*Alston* v. *Munford*, 1 Brock. 266; *Walthaur* v. *Gossar*, 32 Penn. St. 259; *Sargent* v. *Davis*, 3 La. Ann. 353; *Duvall* v. *Green*, 4 Har. & J. [Md.] 270; *McCoy* v. *Nichols*, 5 Miss. [4 How.] 31; *Robertson* v. *Wright*, 17 Gratt. [Va.] 534); and a judgment for or against an heir or devisee has no effect upon an administrator or executor. *Dorr* v. *Stockdale*, 19 Iowa, 269. So, upon the delivery of a legacy to a legatee, the privity between the executor and legatee ceases, and judgment in a suit subsequently commenced against the

executor does not bind the legatee. *Redmond* v. *Coffin*, 2 Dev. (N. C.) Eq. 437. A judgment against an administrator is conclusive only as to the personalty (*Walthaur* v. *Gossar*, 32 Penn. St. 259), and is a lien only upon the property in the hands of the administrator, and not upon the real estate of the ancestor (*Treadwell* v. *Herndon*, 41 Miss. 38); but it is *prima facie* evidence against the realty. *Hopkins* v. *McCann*, 19 Ill. 113; *Sergeant* v. *Ewing*, 36 Penn. St. 156.

Where a *feme covert* defendant, after a regular decree and sale, dies before a conveyance is made to a purchaser, who has paid the purchase-money, her heirs are bound by the decree to convey to the purchaser or his alienee the title which has descended from her to them. *Waring* v. *Reynolds*, 3 B. Monr. (Ky.) 59. And in Texas, in a suit for the specific performance of a contract for the sale of land against an executor, a decree of the district court against him is conclusive against the heirs, in the absence of fraud. *Shannon* v. *Taylor*, 16 Tex. 413.

A posthumous child takes directly from the parent, his estate remaining meanwhile in abeyance, so that he is not bound by a decree had against the other heirs before his birth. *McConnell* v. *Smith*, 23 Ill. 611. See *Detrick* v. *Migatt*, 19 id. 146.

Distributees are held to be concluded by a decree between the administrator and an adverse claimant, as to the title of chattels held by the intestate. *Head* v. *Perry*, 1 T. B. Monr. (Ky.) 253.

§ 11. **Judgment as to same person in different capacity.** Judgment against a party in one capacity is not *res judicata* against him acting in another. *Lander* v. *Arno*, 65 Me. 26; *Brooking* v. *Dearmond*, 27 Ga. 58; *West* v. *Creditors*, 3 La. Ann. 529. Thus, judgment against one as executor does not bar his individual claim (*Cook* v. *Doremus*, 10 La. Ann. 679); and a judgment in trover in favor of the defendant individually is not a bar to a subsequent suit for the same property brought against the same defendant, but in his capacity as an executor. *Davis* v. *Davis*, 30 Ga. 296. Nor is a plaintiff, suing as administrator of his wife, affected by a judgment against himself in her life-time, in an action to which she was not a party. *Blakey* v. *Newby*, 6 Munf. (Va.) 64.

§ 12. **Judgments as to joint debtors.** It is declared to be the rule of the common law, that judgment against one partner, or joint contractor, bars an action against the others, and that the entire cause of action is merged in the judgment. *Mason* v. *Eldred*, 6 Wall. 231; *Trafton* v. *United States*, 3 Story (C. C.), 646; *Clinton Bank* v. *Hart*, 5 Ohio St. 34; *Archer* v. *Heiman*, 21 Ind. 29; *Suydam* v. *Barber*, 18 N. Y. (4 Smith) 468; *Kingsley* v. *Davis*, 104 Mass. 178; *Averill* v. *Loucks*, 6 Barb. 19; *Nichols* v. *Burton*, 5 Bush (Ky.), 320; *Sydam*

v. *Cannon*, 1 Houst. (Del.) 431. But when a contract is several, as well as joint, a judgment against one is no bar to a subsequent action against all, until satisfied. *Harlan* v. *Berry*, 4 Greene (Iowa), 212; *Gilman* v. *Foote*, 22 Iowa, 560; *King* v. *Hoare*, 13 Mees. & W. 504; *McReady* v. *Rogers*, 1 Neb. 124; *Simonds* v. *Center*, 6 Mass. 18. In Missouri, judgment against one of two joint debtors, without satisfaction, is no bar to an action against his co-obligor. *Armstrong* v. *Prewitt*, 5 Mo. 476. And see *Phillips* v. *Fitzpatrick*, 34 id. 276. So, in South Carolina, a recovery against two partners where there are more is no bar to a subsequent action for the same cause against all. *Union Bank* v. *Hodges*, 12 Rich. (S. C.) 480. And it was held in Alabama that, in a suit against one partner, on a claim against the partnership, a judgment in favor of the other partner, in a former suit, by the same plaintiff, on the same cause of action, in which he was alone a party, is no bar, or evidence of payment. *McLelland* v. *Ridgeway*, 12 Ala. 482. And a judgment against two jointly decides nothing as to the liability or measure of liability between the two, in a suit between them. *Buffington* v. *Cook*, 35 id. 312. And see *Cox* v. *Hill*, 3 Ohio, 411.

Where one of two or more persons who are jointly liable is without the State, as appears by the officer's return, so that no service can be made upon him, judgment may be rendered against such of them as are found within the jurisdiction, and such judgment remaining unsatisfied, is no bar to a subsequent suit and judgment against the one who was absent. *Olcott* v. *Little*, 9 N. H. 259; *Burt* v. *Stevens*, 22 id. 232; *Rand* v. *Nutter*, 56 Me. 339; *Brown* v. *Birdsall*, 29 Barb. 549.

Where a plaintiff, having an election between two parties liable for the same debt, proceeds against one and recovers judgment, the other is discharged. *Gray* v. *Palmer*, 2 Robt. (N. Y.) 500.

§ 13. **Judgment as to joint trespassers.** According to the weight of the more recent decisions, it is the correct rule that a judgment against one joint trespasser is no bar to a suit against another for the same trespass. Nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar. *Elliot* v. *Porter*, 5 Dana (Ky.), 299; *Sheldon* v. *Kibbe*, 3 Conn. 214; *Elliott* v. *Hayden*, 104 Mass. 180; *Murray* v. *Lovejoy*, 2 Cliff. (C. C.) 191; S. C. affirmed, 3 Wall. 1; *Knott* v. *Cunningham*, 2 Sneed (Tenn.), 204; *Turner* v. *Brock*, 6 Heisk. (Tenn.) 50; *United Society of Shakers* v. *Underwood*, 11 Bush (Ky.), 265; S. C., 21 Am. Rep. 214; *Mitchell* v. *Libbey*, 33 Me. 74; *Davis* v. *Caswell*, 50 id. 294. And a plea, setting forth a former recovery against a co-trespasser, and a voluntary payment of the damages and costs to the clerk in open court by the

defendant in that judgment, without averring that the plaintiff accepted such payment in satisfaction of his recovery, was held to be bad on demurrer. *Blann* v. *Crocheron*, 20 Ala. 320. Among the earlier cases sustaining an opposite conclusion from the rule above stated, see *Warden* v. *Bailey*, 4 Taunt. 88; *Wilkes* v. *Jackson*, 2 Hen. & M. (Va.) 355; *Smith* v. *Singleton*, 2 McMull. (S. C.) 184; *Campbell* v. *Phelps*, 1 Pick. 61; *Hunt* v. *Bates*, 7 R. I. 217.

A judgment for the plaintiff in replevin against one of two joint takers of goods, for a part of the goods taken, is held to be a bar to a subsequent action against both to recover damages for the same trespass, if the other goods are not shown to have been concealed, or otherwise disposed of, so that they could not be replevied. *Bennett* v. *Hood*, 1 Allen, 47.

In trespass for assault and battery, the defendant gave notice that he sued the plaintiff for the identical assault and battery declared upon, and recovered judgment against him, which he paid, and it was held to be no bar. *Cade* v. *McFarland*, 48 Vt. 47.

Where a joint judgment is recovered against the owners of a stage coach and the driver, for injuries resulting from the negligence of the latter, and is satisfied by the owners, the driver cannot plead, in an action for contribution, brought by the owners, that he was not legally liable in the original action. *Bailey* v. *Bussing*, 37 Conn. 349.

§ 14. **Judgments as affecting sureties.** In the absence of any showing of fraud or collusion, a judgment against the principal is to be deemed conclusive both against him and the surety. *Berger* v. *Williams*, 4 McLean (C. C.), 577; *State* v. *Jennings*, 14 Ohio St. 73; *Lipscomb* v. *Postell*, 38 Miss. 476; *Casoni* v. *Jerome*, 58 N. Y. (13 Sick.) 315, 322; *Bradwell* v. *Spencer*, 16 Ga. 578; *Cutter* v. *Evans*, 115 Mass. 27; *Way* v. *Lewis*, id. 26. But see *King* v. *Norman*, 4 C. B. 884; *Morris* v. *Lucas*, 8 Blackf. (Ind.) 9. By signing an injunction bond with a plaintiff in a suit in equity, the sureties voluntarily assume such a connection with that suit that they are concluded by a decree in it, in a suit at law upon the bond, as far as the same matters are in question. *Towle* v. *Towle*, 46 N. H. 432. Sureties in an administration bond are bound by a decree against their administrator finding assets in his hands, and non-payment of them over, to the same extent to which the administrator himself is bound. *Stovall* v. *Banks*, 10 Wall. 583. And see *McCalla* v. *Patterson*, 18 B. Monr. (Ky.) 201; *Field* v. *Van Cott*, 5 Daly (N. Y.), 308; S. C., 15 Abb. (N. S.) 349; *Shelton* v. *Cureton*, 3 McCord (S. C.), 412; *Hobson* v. *Yancey*, 2 Gratt. (Va.) 73; *Garber* v. *Commonwealth*, 7 Penn. St. 265. And a judgment in favor of an administrator is a bar to an action upon the same

subject-matter against the securities on his administration bond. *State* v. *Coste*, 36 Mo. 437. The rule applicable to the sureties of an administrator also applies to sureties on the official bonds of sheriffs, constables, guardians and trustees. Id.; *Heard* v. *Lodge*, 20 Pick. 53; *Tracy* v. *Goodwin*, 5 Allen, 409; *Brown* v. *Bradford*, 30 Ga. 927; *Hand* v. *Taylor*, 4 Ind. 409; *Huzzard* v. *Nagle*, 40 Penn. St. 178; *Jones* v. *Oswald*, 2 Bailey (S. C.), 214; *Bradley* v. *Chamberlin*, 35 Vt. 277. But a judgment obtained against a sheriff for official neglect, without notice to his sureties, is not conclusive against them if obtained by fraud or collusion. *Dane* v. *Gilmore*, 51 Me. 544. And see *Atkins* v. *Bailey*, 9 Yerg. (Tenn.) 111; *Lucas* v. *Governor*, 6 Ala. 826. And where judgment was recovered against a sheriff for the alleged misconduct of his deputy, and due notice of the action was given to the latter, but not to the sureties in a bond given by him for the faithful performance of the duties of his office, it was held, in a suit upon the bond, that by this judgment a breach of the condition of the bond was not conclusively established against the sureties. *Thomas* v. *Hubbell*, 15 N. Y. (1 Smith) 405. See 1 Wait's L. & Pr. 379, 380.

A recovery against the principal, for his defalcations as the officer of an incorporated company, is not evidence against the surety on his official bond, either of the fact of embezzlement, or of the amount embezzled. *Firemen's Ins. Co.* v. *McMillan*, 29 Ala. 147.

§ 15. **Judgments as to sheriffs and deputies.** A verdict against a sheriff, for the default of his deputy, may be used as evidence in an action by the sheriff against the deputy, the latter being presumed to be notified, and to be substantially a party to the suit. *Tyler* v. *Ulmer*, 12 Mass. 163. So, it is held that a judgment for the plaintiff in trespass *de bonis asportatis*, against a deputy sheriff, and execution taken out thereon, though unsatisfied, may be pleaded in bar to an action against the sheriff for the same trespass. *Campbell* v. *Phelps*, 1 Pick. 62. But see *Morgan* v. *Chester*, 4 Conn. 387. A nonsuit in an action against a deputy sheriff for the wrongful attachment of property is no bar to an action against the sheriff for the same cause. *Clapp* v. *Thomas*, 5 Allen, 158.

Where parties join in a bond of indemnity as principal and sureties, they are in privity of contract with each other, and are to be regarded and treated, *quoad* the contract, and the rights and liabilities connected with and growing out of it, as one person. In such a case, notice to one is notice to all. *Fay* v. *Ames*, 44 Barb. 327. Thus, in an action by a sheriff upon the bond given by a deputy sheriff on receiving his appointment, to indemnify the sheriff against his acts or omissions as such deputy, the surety in such bond is concluded by a judgment

recovered against the sheriff in an action brought against him for the neglect of the deputy to collect an execution, of which action the deputy had notice, and which he defended, although no notice of such suit was given to the surety. Id.; *Crawford* v. *Turk*, 24 Gratt. (Va.) 176. See Vol. 5, pp. 211, 212.

It is, however, held that where, in an action against the sheriff for the negligence of his deputy, judgment is recovered against him by default, this judgment is not conclusive against the deputy in another action, brought upon his bond for the faithful discharge of his duty, but he may make any defense which the sheriff could have made in the first suit. *Wilkins* v. *Dingley*, 29 Me. 73.

§ 16. **Judgment as to attaching and other creditors.** A plaintiff in attachment who indemnifies the attaching officer, and afterward takes upon himself the defense when that officer is sued, is concluded by the judgment against that officer, where such plaintiff is afterward sued for the same trespass. *Murray* v. *Lovejoy*, 2 Cliff. (C. C.) 191; S. C. affirmed, 3 Wall. (U. S.) 1. A judgment, though not satisfied, obtained against a deputy sheriff in an action of trover for the wrongful attachment and conversion of certain goods, was held to be a bar to a subsequent action of trespass for the same goods, against the plaintiff in the writ of attachment by whose direction the officer attached the goods. *Hunt* v. *Bates*, 7 R. I. 217.

Subsequent attaching creditors and the assignee of the defendant upon the record, having been admitted to defend in his name, may plead a former recovery by the plaintiff, where the defendant could have pleaded it as a defense. *Child* v. *Eureka Powder Works*, 45 N. H. 547.

A judgment in foreign attachment against an agent does not bar a judgment against the principal for the uncollected balance. *Glenn* v. *Davis*, 2 Grant's (Penn.) Cas. 153.

§ 17. **Judgment as to interpleader parties.** Where property is attached in a suit, if one not a party claim the same and interplead, a judgment against him, not appealed from, is an estoppel, and he cannot afterward maintain a suit for the same property upon a title that accrued prior to the interpleader. *Richardson* v. *Watson*, 23 Mo. 34. See *Kerr* v. *Union Bank*, 18 Md. 396.

§ 18. **Judgment as to parties to promissory notes.** A judgment against one of the makers of a joint promissory note merges the note, and is a bar to an action on the same note against the other makers, or all the makers. *Crosbey* v. *Jeroloman*, 37 Ind. 264; *Barnett* v. *Juday*, 38 id. 86. See *ante*, p. 794, § 12. And a judgment for the defendant on the merits, in an action on a note by an indorsee against the maker,

is held to be a bar to a subsequent action on the note by the payee. *Levi* v. *McCraney*, 1 Morr. (Iowa) 91. But see *Wells* v. *Coyle*, 20 La. Ann. 396. An unsatisfied judgment against the maker of a note was held to be no bar to an action against the indorser. *Porter* v. *Ingraham*, 10 Mass. 88. And a judgment against a surety on a note does not necessarily bar a suit against his co-surety. *Hill* v. *Morse*, 61 Me. 541.

When no notice is given, and the maker of a promissory note succeeds in defeating a recovery on the merits, the judgment is in all cases *prima facie* evidence in a suit by the indorsee against his indorser, and it rests with the latter to show that the defense interposed by the maker is invalid. *Hagerty* v. *Bradford*, 9 Ala. 567. See *Winston* v. *Westfeldt*, 22 id. 760.

In an action against a prior indorser of a note by a subsequent indorser, who had paid a judgment obtained upon the note by the holder against all the indorsers, the record of that judgment will be conclusive (*Lloyd* v. *Barr*, 11 Penn. St. 41); and this, notwithstanding the record was of a suit in which the defendants, as indorsers, were misjoined, and the declaration averred a joint implied promise. Id.

§ 19. **Pleading the defense.** The record of a former judgment is not admissible as constituting a bar or estoppel to an action without being pleaded. *Lyon* v. *Tallmadge*, 14 Johns. 501; *Van Orman* v. *Spafford*, 16 Iowa, 186; *Redmond* v. *Coffin*, 2 Dev. (N. C.) Eq. 437; *West* v. *Creditors*, 4 La. Ann. 448; *Greely* v. *Smith*, 3 Woodb. & M. 236; *Krekeler* v. *Ritter*, 62 N. Y. (17 Sick.) 372. But a former recovery, in which the same matter was tried upon the merits, may be given in evidence without being specially pleaded, wherever the party, plaintiff or defendant, had no opportunity to plead the recovery specially. And such a recovery, though received in evidence under general pleadings, is as conclusive as in cases where the matter is specially pleaded. Id.; *Young* v. *Rummell*, 2 Hill, 478; *Beebe* v. *Elliott*, 4 Barb. 457; *Reynolds* v. *Stansbury*, 20 Ohio, 344; *Sheldon* v. *Patterson*, 55 Ill. 507; *Strong* v. *Phœnix Ins. Co.*, 62 Mo. 289; 21 Am. Rep. 417; *Whitney* v. *Clarendon*, 18 Vt. 252; *Ward* v. *Ward*, 22 N. J. Law, 699. But see *Cleaton* v. *Chambliss*, 6 Rand. (Va.) 86.

The defense that there has been a former adjudication of the matter in controversy is neither dishonest nor unconscionable. Therefore, on opening, upon sufficient excuse, a default regularly taken against the defendant, the court should not impose, as terms of the favor, a requirement that the defendant shall not interpose a defense of a former adjudication. *Audubon* v. *Excelsior Fire Ins. Co.*, 10 Abb. Pr. (N. Y.) 64.

It is not necessary that a plea of a former judgment should be certain in every particular. *Eversole* v. *Plank*, 17 Ohio, 61. And a valid judgment, although there may have been errors in the proceedings, may be pleaded as a former adjudication of the matters embraced in the issues in the action wherein it was rendered. *Davenport* v. *Barnett*, 51 Ind. 329.

Where the defendant relies in defense upon an agreement under which a former action for the same cause was dismissed, settled, or released, he must raise such defense by plea, otherwise it will not be available as a bar. *Haldeman* v. *United States*, 91 U. S. (1 Otto) 584.

§ 20. **Proof of former adjudication.** The jury are to inquire under the plea of *res adjudicata*, whether the right asserted or the wrong complained of is virtually or substantially identical with that involved in the first suit, and this identity is determined, not by the pleadings only, but, when submitted to the jury, by parol proof. *Streeks* v. *Dyer*, 39 Md. 424; *Whitehurst* v. *Rogers*, 38 id. 503; *Bottorff* v. *Wise*, 53 Ind. 32. The rule in brief is, that parol evidence is admissible to show the identity of the thing or the contrary, when necessary from the obscurity of the judgment pleaded as *res judicata*. *Wood* v. *Jackson*, 8 Wend. 9; *Strother* v. *Butler*, 17 Ala. 733; *Warwick* v. *Underwood*, 3 Head (Tenn.), 238; *Sturtevant* v. *Randall*, 53 Me. 149; *Russell* v. *Place*, 94 U. S. (4 Otto) 606. But when extrinsic evidence is necessary to show that the same issue was involved in a former trial, the judgment in which is alleged to be conclusive in this, such evidence may be controverted. *Packet Company* v. *Sickles*, 5 Wall. 580. If the identity of the matter in issue is shown, then the record of the former recovery, in case there has been no opportunity to plead it in the pending suit as an estoppel, may be given in evidence, and, as such, will be conclusive. *Perkins* v. *Walker*, 19 Vt. 144. And see § 19, *ante*, p. 799.

The rejection of the briefs of counsel, as evidence to show that a judgment which had been proved as *res adjudicata* was not a determination of the merits, was held not to be error. Briefs of counsel are not an unerring indication of the basis upon which the judgment has been rendered. *Greenlee* v. *Lowing*, 35 Mich. 63.

## ARTICLE III.

### OF JUDGMENTS AS TO PERSONS NOT PARTIES OR PRIVIES.

**Section 1. In general.** As a general rule, judgments and decrees are evidence only between the parties and privies, but, like most other

rules, this has exceptions. See *Key* v. *Dent*, 14 Md. 86. Some of these exceptions will be noticed in the sections immediately following.

§ 2. **How far conclusive.** A judgment is always evidence of the fact that such a judgment was rendered, and of the legal consequences resulting therefrom, whether the person against whom it is offered was a party to the action in which it was rendered or not. *Ansley* v. *Carlos*, 9 Ala. 973; *Maple* v. *Beach*, 43 Ind. 51. *Hardwick* v. *Hook*, 8 Ga. 354. So, judgments may be used in evidence by strangers to the record, by way of inducement, or to establish the collateral facts and for various other purposes. *Chamberlain* v. *Carlisle*, 26 N. H. 540. Where reputation is admissible in evidence, a verdict between strangers may be also, as on the question of pedigree. *Pile* v. *McBratney*, 15 Ill. 314; *Patterson* v. *Gaines*, 6 How. (U. S.) 550. And the record in a chancery cause is evidence to prove a link in a chain of title though the opposite party was not a party in that cause. *Barney* v. *Patterson*, 6 Harr. & J. (Md.) 182; *Baylor* v. *Dejarnette*, 13 Gratt. (Va.) 152. An adjudication which settled a disputed boundary line of lands is binding, not only upon parties of record, but upon one who was interested in the defense in the action and who in fact conducted the defense, though in the name of another. *McNamee* v. *Moreland*, 26 Iowa, 96. An assignee under a voluntary assignment for the benefit of creditors is bound by judgments rendered against the assignor before the assignment, and is not entitled to notice of its revival. *Re Fulton's Estate*, 51 Penn. St. 204. So, the record of an action on a note is admissible against a stranger who calls the plaintiff in such action as a witness, to show that such plaintiff was the holder at that time. *Appleton* v. *Donaldson*, 3 Penn. St. 381. And in a suit by a surety against a co-surety for contribution, the plaintiff may put in evidence a judgment against himself and the principal debtor, founded on the debt on which the parties were sureties. *Preslar* v. *Stallworth*, 37 Ala. 402. In a recent case in Tennessee, it is held that when suit is brought against a surety for a debt from which the principal has been discharged by a court of competent jurisdiction, the surety is entitled, upon proof of the fact of a valid discharge, to rely upon the judgment of discharge as an estoppel, and that this is to be regarded as an exception to the general rule of *res inter alios acta*. *Gill* v. *Morris*, 11 Heisk. (Tenn.) 614. See *ante*, p. 796, Art. 2, § 14; also *Giltinan* v. *Strong*, 64 Penn. St. 242.

Judgments *in rem* are binding, not only upon parties and privies, but also upon strangers. *The Mary Anne*, 1 Ware, 104; *The Globe*, 2 Blatchf. (C. C.) 427; *State* v. *Central Pacific R. R. Co.*, 10 Nev. 47.

And it is held that a decree for the sale of the estate of a lunatic, for the payment of debts, is a decree *in rem*, and the creditors are bound by it, though not parties to the proceeding. *Latham* v. *Wiswall*, 2 Ired. (N. C.) Eq. 294.

§ 3. **When not conclusive.** Judgments, foreign or domestic, ought not to bar subsequent suits, generally, unless between the same parties or their privies, and for the same matter, before and once actually litigated and decided on by the court. *Long* v. *Cason*, 4 Rich. (S. C.) Eq. 60; *Burnham* v. *Webster*, 1 Woodb. & M. 172; *Cockey* v. *Milne*, 16 Md. 200; *Niller* v. *Johnson*, 27 id. 6; *D' Wolf* v. *Pratt*, 42 Ill. 198; *Brock* v. *Garrett*, 16 Ga. 487; *National Ins. Co.* v. *McKay*, 5 Abb. Pr. (N. S.) 445.

It is a general principle that an action and judgment between two persons shall not bind or affect a third person who could not be admitted to make a defense, to examine witnesses, or to appeal from the judgment. *Yorks* v. *Steele*, 50 Barb. 397. And see *Troy* v. *Smith*, 33 Ala. 469; *Cameron* v. *Cameron*, 15 Wis. 1; *Downer* v. *Morrison*, 2 Gratt. (Va.) 250; *Putnam* v. *Fisher*, 34 Me. 172; *Smith* v. *Chapin*, 31 Conn. 530; *Craft* v. *Diamond*, 23 Ga. 418.

The right of a party to the salary of an office to which he has the title is not affected by the fact that it has been paid by the direction of the court in a proceeding to which he was not a party, to another party usurping the office. *Dorsey* v. *Smyth*, 28 Cal. 21. A person whose goods have been improperly seized under a writ of attachment, and who is no party to the suit, is not concluded by the judgment in the attachment, and may replevy the same from the officer. *Samuel* v. *Agnew*, 80 Ill. 553. An unsatisfied judgment, in case for chattels wrongfully withheld, does not estop the plaintiff from proceeding in replevin against a third person in whose hands they are found. And this is held to be so, although the defendants in the two actions were joint trespassers, or the defendant in replevin a purchaser from the defendant in case. *Turner* v. *Brock*, 6 Heisk. (Tenn.) 50. A judgment in favor of A, setting aside an assessment for a local improvement, binds only the parties to the suit in which it was rendered, and does not prevent B from maintaining an action to restrain the collection of the same assessment. *Zink* v. *City of Buffalo*, 6 Hun (N. Y.), 611. Where an infant child sues by her father as guardian, for damages for suffering and deformity caused by the act of a vicious animal belonging to the defendant and recovers judgment, such judgment is not available as a bar or admissible in evidence, in a suit brought by the father in his own name for services rendered and expenses incurred in the care of the wounds inflicted upon the child. *Karr* v. *Parks*, 44 Cal. 46.

The heir of the intestate is not bound by a judgment in ejectment against a tenant of the administrator, if the administrator is not bound by it. *Chant* v. *Reynolds*, 49 id. 213. And as a general rule, a judgment rendered in a cause to which the heirs only were parties, is not binding upon the administrator of the estate. *Dorr* v. *Stockdale*, 19 Iowa, 269. And see *ante*, p. 793, Art. 2, § 9.

A person who was not a party to a former action, or in privity with a party, may maintain an action of tort against a person, also not a party to the former action, for suborning witnesses to testify falsely in that action, whereby the character of the plaintiff in the latter action was defamed. *Rice* v. *Coolidge*, 121 Mass. 393; S. C., 23 Am. Rep. 279.

§ 4. **Of notice, or citing to defend.** It is said to be well settled, that a landlord is not bound by a judgment in ejectment against his tenant, unless he had notice of the action and an opportunity to defend in the name of the tenant. *Chant* v. *Reynolds*, 49 Cal. 213. And see *Samuel* v. *Dinkins*, 12 Rich. (S. C.) 172; *Turpin* v. *Thomas*, 2 Hen. & M. (Va.) 139. So, a judgment against the sheriff for the amount of an execution levied by a deputy is not binding on the sureties upon the deputy sheriff's bond where they have had no notice to defend the action in which it was rendered. *Thomas* v. *Hubbell*, 35 N. Y. (8 Tiff.) 120. See *ante*, p. 797, Art. 2, § 15. And it is held that a verdict and judgment against the assignee of a promissory note, in a suit against the maker, are not evidence in a suit by the assignee against the assignor, unless the latter had notice of the suit. *Morgan* v. *Simmons*, 3 J. J. Marsh. (Ky.) 611; *Maupin* v. *Compton*, 3 Bibb (Ky.), 214. So, in an action of covenant broken, a judgment against the grantee, recovered by one claiming under a prior title, is not conclusive against a grantor who had no notice of the former suit. *Perkins* v. *Pitts*, 11 Mass. 125. But if, when a tenant is sued, his landlord is notified of the pendency of the suit, and has an opportunity of coming in, cross-examining the witnesses, and defending the action, his identity with the defendant is sufficiently established to support a plea of *res judicata*, in a subsequent suit, involving the same subject-matter, in which he is a party of record. *Harvie* v. *Turner*, 46 Mo. 444; *Fogarty* v. *Sparks*, 22 Cal. 142. And a judgment on the merits is *prima facie* evidence against one liable over, though not notified of the suit. *Tam* v. *Shaw*, 10 Ind. 469. See, also, *Train* v. *Gold*, 5 Pick. 380; *Snider* v. *Greathouse*, 16 Ark. 72 And one who is vouched or notified to come in and defend a title is bound by the judgment equally, whether he appear or not. *Andrews* v. *Davison*, 17 N. H. 413; *Littleton* v. *Richardson*, 34 id. 179; *Veazie* v. *Penobscot R. R. Co.*, 49 Me. 119; *Port-*

*land* v. *Richardson*, 54 Me. 46. And it is held that, in an action by a corporation which has been compelled to pay damages for injuries received from defects in a public street, caused by the fault of the defendant, to recover the amount so paid, the defendant cannot plead want of notice of the pendency of the former suit, where it appears that he had actual knowledge thereof, and could have defended it. *Chicago* v. *Robbins*, 2 Black (U. S.), 418; S. C. affirmed, 4 Wall. 658.

§ 5. **Proof of former adjudication.** As to parol proof of former adjudication see Art. 2, p. 800, § 20. The burden of proof of a former recovery is on the party alleging it. *Brown* v. *Street*, 60 Ind. 8. It has been held that a judgment roll may be admitted in evidence, although no summons is attached, and although being founded on the report of a referee, it does not show an order of reference, these being matters which might render the judgment erroneous, but do not make it void. *Calkins* v. *Packer*, 21 Barb. 275. And see *State* v. *Ramsburg*, 43 Md. 325; *Bruner* v. *Ramsburg*, id. 560. But the introduction in evidence of the record of the judgment only, without a transcript of the record of the proceedings in the case, showing jurisdiction in the court rendering the judgment, and that the judgment itself was within the relief sought, was held not to be a sufficient showing of title in the purchaser at a sheriff's sale under the judgment. *Glidewell* v. *Spaugh*, 26 Ind. 319. And a decree of divorce, when offered in evidence, must be shown to be within the conditions and limitations which the statute prescribes. *Lawrence's Case*, 18 Abb. Pr. (N. Y.) 347.

The records of a probate court import absolute verity as respects a party to the proceedings of which they are records, subject to amendment and correction in a direct proceeding for that purpose, and not otherwise. They are, therefore, conclusive upon such party in a collateral proceeding. *Dayton* v. *Mintzer*, 22 Minn. 393. See Art. 1, pp. 767, 768, §§ 2, 3.

§ 6. **Effect as a precedent.** See Vol. 2, pp. 286, 287. Where the court has deliberately examined and settled a legal question in one suit, it will not afterward listen to an argument of the same question, although it arises in another suit between different parties. *Teal* v. *Woodworth*, 3 Paige, 470. And see *Kearney* v. *Buttles*, 1 Ohio St. 362; *Alexander* v. *Worthington*, 5 Md. 471. But an opinion in one case, so far as it is a deduction from facts, cannot be authoritative in any other case, though the subject-matter be the same, and the facts chiefly the same, as to persons who were neither parties nor privies in that case. *May* v. *Fenton*, 7 J. J. Marsh. (Ky.) 306.

In considering the authority of a precedent in law, if a point is essen-

tial to the decision rendered, it will be presumed that it was duly considered, and that all that could be urged for or against it was presented to the court. But if it appears from the report of the case, that it was not taken or inquired into at all, there is no ground for this presumption, and the authority of the case is proportionately weakened. *Molony* v. *Dows*, 8 Abb. Pr. (N. Y.) 316. See *Bottorff* v. *Wise*, 53 Ind. 32; *Gaines* v. *Kennedy*, 53 Miss. 103.

§ 7. **Of collateral impeachment.** It is a general doctrine of the law that, where the court has jurisdiction of the subject-matter and of the parties, its judgments, although irregular in form, or erroneous, are conclusive, so long as they remain unreversed, and they cannot be attacked collaterally. *Lancaster* v. *Wilson*, 27 Gratt. (Va.) 624; *Secrist* v. *Green*, 3 Wall. 744; *Cooper* v. *Reynolds*, 10 id. 316; *Cochran* v. *Davis*, 20 Ga. 581; *Davis* v. *Helbig*, 27 Md. 452; *Moore* v. *Robison*, 6 Ohio St. 302; *Billings* v. *Russell*, 23 Penn. St. 189; *Moore* v. *Ware*, 51 Miss. 206; *Willis* v. *Ferguson*, 46 Tex. 496; *Gunn* v. *Plant*, 94 U. S. (4 Otto) 664; *Lawrence* v. *Englesby*, 24 Vt. 42; *George* v. *Norris*, 23 Ark. 121. And a judgment rendered by a competent court, charged with a special statutory jurisdiction, and when all the facts necessary to the exercise of the jurisdiction are shown to exist, is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction. *Secombe* v. *Railroad Co.*, 23 Wall. 108. And see *Dixey* v. *Laning*, 49 Penn. St. 143; *McCahill* v. *Equitable Life Ass. Soc.*, 26 N. J. Eq. 531; *Lownsberry* v. *Rakestraw*, 14 Kans. 151; *Allen* v. *Mill*, 26 Mich. 123; *Read* v. *City of Buffalo*, 4 Abb. App. Dec. (N. Y.) 22; S. C., 3 Keyes, 447.

§ 8. **What judgments may be impeached.** But the rule against impeaching judgments collaterally applies to judgments which are voidable only. Judgments *voidable* merely are binding until reversed by some direct proceeding (*Hall* v. *Heffly*, 6 Humph. [Tenn.] 444; *Enos* v. *Smith*, 15 Miss. 85; *Barron* v. *Tart*, 18 Sm. & M. [Ala.] 668; *Reed* v. *Wright*, 2 Greene [Iowa], 15); but *void* judgments are never binding, and can always be impeached. Id.; *James* v. *Smith*, 2 So. Car. 183; *Morris* v. *Halbert*, 36 Tex. 19. And a judgment rendered on Sunday is void at common law. *Blood* v. *Bates*, 31 Vt. 147.

§ 9. **Impeaching judgment for want of jurisdiction.** To render a judgment valid, the court must have jurisdiction of the cause, and of the parties. *Warren Manuf. Co.* v. *Ætna Ins. Co.*, 2 Paine (C. C.), 501. And a judgment appearing to be rendered by a court having no jurisdiction is a nullity, and may be so treated when it comes in question collaterally. *Seely* v. *Reed*, 3 Iowa, 374; *Dicks* v. *Hatch*, 10 id. 380; *Withers* v. *Patterson*, 27 Tex. 491; *Miller* v. *Snyder*, 6 Ind. 1;

*City of Camden* v. *Mulford*, 26 N. J. Law, 49; *Central Bank* v. *Gibson*, 11 Ga. 453; *Dorsey* v. *Kendall*, 8 Bush (Ky.), 294. And it is stated to be a well-settled principle, that wherever a tribunal possesses qualified and limited powers, authorizing them to act in certain specified cases only, and by special modes of proceeding, and the law has provided no mode by which these proceedings can be revised, there the proceedings may be impeached collaterally, by showing that the court or magistrates have acted in a case where they have no jurisdiction, or by modes of procedure which they are not authorized to adopt. *Sanborn* v. *Fellows*, 22 N. H. 473; *Gurnsey* v. *Edwards*, 26 id. 224. And see *Crawford* v. *Howard*, 30 Me. 422. But where it appears from the records of an inferior court that there was evidence before it tending to show the existence of the facts necessary to give it jurisdiction, and that such evidence was adjudged sufficient, such judgment cannot be impeached or contradicted in an action in another court. *Sheldon* v. *Wright*, 5 N. Y. (1 Seld.) 497.

§ 10. **Want of jurisdiction over parties.** Where the record of a domestic judgment of a court of general jurisdiction of the subject-matter comes collaterally in question in another court, and discloses nothing to the contrary, it will be presumed that the court had jurisdiction of the person and of the matter in controversy. *Hopper* v. *Fisher*, 2 Head (Tenn.), 253; *Horner* v. *State Bank*, 1 Ind. 130; *Falkner* v. *Guild*, 10 Wis. 563. But the presumption in favor of the judgments of superior courts is limited to jurisdiction over persons within their territorial limits, and to proceedings in accordance with the common law. If it appears, either from the record or by evidence outside, that the defendants were, at the time of the alleged service upon them, beyond the reach of the process of the court, or when the proceeding was not one in accordance with the common law, the presumption ceases, and the burden of establishing the jurisdiction over them is thrown upon the party who invokes the benefit of the judgments. *Gray* v. *Larrimore*, 2 Abb. (U. S.) 542. And see *Hess* v. *Cole*, 23 N. J. Law, 116; *McMinn* v. *Whelan*, 27 Cal. 300; *Mills* v. *Dickson*, 6 Rich. (S. C.) 487; *Coit* v. *Haven*, 30 Conn. 190; *Penobscot R. R. Co.* v. *Weeks*, 52 Me. 456. If the necessary notice has not been given, or if process has not been served, the court has no authority to act, and all its proceedings are absolutely void. *Outhwite* v. *Porter*, 13 Mich. 533; *Goudy* v. *Hall*, 30 Ill. 109; *Wort* v. *Finley*, 8 Blackf. (Ind.) 335; *Webster* v. *Reid*, 11 How. (U. S.) 437. But a judgment, notwithstanding the service of the writ may not be in conformity with the requirements of the statute, is to be deemed valid and binding collaterally upon all parties and privies to it, until it is reversed. *Crizer* v. *Gorren*, 41 Miss. 563; *Cole* v. *Butler*, 43 Me. 401; *Kipp* v. *Fuller*-

*ton*, 4 Minn. 473; *Shawhan* v. *Loffer*, 24 Iowa, 217; *Martin* v. *Barron*, 37 Mo. 301.

Under the system of practice established in New York, the want of jurisdiction may always be set up against a judgment when sought to be enforced, or when any benefit is claimed under it, and the bare recital of jurisdictional facts in the record of the judgment of any court is not conclusive, but only *prima facie* evidence, and may be disproved by extrinsic evidence. *Ferguson* v. *Crawford*, 70 N. Y. (25 Sick.) 253; *Ormsby* v. *Jacques*, 12 Hun, 443. See *Brown* v. *Nichols*, 42 N. Y. (3 Hand) 26.

§ 11. **Impeachment for irregularities.** A judgment merely irregular cannot be impeached collaterally (*Den* v. *O'Hanlon*, 21 N. J. Law, 582; *Dorsey* v. *Thompson*, 37 Md. 25; *Cyphert* v. *McClune*, 22 Penn. St. 195; *ante*, p. 805, § 7); and, though irregular, may be given in evidence. *Goodwin* v. *Mix*, 38 Ill. 115; *Bryan* v. *Walton*, 20 Ga. 480; *Ray* v. *Rowley*, 1 Hun (N. Y.), 614; S. C., 4 N. Y. Sup. Ct. (T. & C.) 43; *Wyche* v. *Clapp*, 43 Tex. 543. Thus, an order of the court establishing a road of a greater width than the law allowed, which has never been appealed from, is irregular only, and not void, and cannot be assailed in any collateral proceeding. *Knowles* v. *Muscatine*, 20 Iowa, 248.

And defective findings, or the absence of any findings of fact in a trial by consent by the court, do not render the judgment a nullity, and it cannot therefore be collaterally attacked. These facts are grounds only for reversal on appeal. *Breeze* v. *Doyle*, 19 Cal. 101. Nor can a final decree of the probate court, rendered on publication, against an administrator, be collaterally impeached on account of irregularities which would reverse it on error, when the record shows that the court had jurisdiction of the parties and subject-matter. *Lyon* v. *Odom*, 31 Ala. 234. See, also, *Rowe* v. *Parsons*, 6 Hun (N. Y.), 338. And where the judgment and proceedings before a justice's court are brought collaterally in question, and the jurisdiction of the subject-matter or thing affirmatively appears, they are not to be held null and void for such irregularities as would merely be grounds of reversal in a direct proceeding to review them. *Boothe* v. *Estes*, 16 Ark. 104. See, also, *Reid* v. *Spoon*, 66 No. Car. 415.

A judgment entered by confession in a court having general jurisdiction of the subject-matter, although without the affidavit required by statute, cannot be inquired into collaterally by a stranger to the record on the ground of such irregularity; and the judgment is admissible in evidence, without proof of the existence of the affidavit. *Dean* v. *Thatcher*, 32 N. J. Law, 470. A subsequent judgment creditor cannot set aside a judgment merely because it is erroneous. *Roemer*

v. *Denig*, 18 Penn. St. 482; *Miners, etc., Bank* v. *Rosberry*, 81 id. 309. And in distributing the proceeds of real estate, an auditor cannot go behind the record of a judgment to inquire into its validity. *Malone's Appeal*, 79 id. 481. See, also, *Stovall* v. *Banks*, 10 Wall. 583. Nor can the judgment on foreclosure of a void mortgage be impugned collaterally, except for fraud. The mortgage is merged in the judgment. *Butterfield's Appeal*, 77 Penn. St. 197.

Where property was replevied from an officer on the alleged ground that it was held under an illegal levy, and, on the trial, the finding was against the plaintiff in replevin, who was ordered to return the property, it will be presumed, in the absence of any showing to the contrary, that the question as to the legality of the levy was settled in the replevin suit and such judgment in respect to the character of the levy will be binding in all collateral proceedings so long as it remains in force. *McDaniel* v. *Fox*, 77 Ill. 343.

§ 12. **Impeachment for defects in pleadings.** An imperfection in a pleading which might have been remedied by amendment or motion to make more definite should not be held to vitiate the judgment rendered thereon. *Haygood* v. *McKoon*, 49 Mo. 77. Thus, it is held that, in ejectment, where title is claimed under proceedings in partition in the orphan's court, the record of that court is admissible as evidence, though the petition and the other applications in the partition and sale of the land and confirmation of the deed are not under oath. *Waters* v. *Bates*, 44 Penn. St. 473. And see *Winston* v. *Affalter*, 49 Mo. 263; *Chamberlain* v. *Preble*, 11 Allen, 370; *Richards* v. *McMillan*, 6 Cal. 419; *Bond* v. *Pacheco*, 30 id. 530.

§ 13. **Impeachment for error.** See *ante*, pp. 805, 807, §§ 9, 11. The judgment of a court having jurisdiction, although erroneous, is good until set aside. *Ritter* v. *Brendlinger*, 58 Penn. St. 68; *State* v. *Conoly*, 6 Ired. (N. C.) L. 243; *Crutchfield* v. *State*, 24 Ga. 335; *Sheldon* v. *Newton*, 3 Ohio St. 494. And it is held that where the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error. *Shaver* v. *Shell*, 24 Ark. 122; *Saltonstall* v. *Riley*, 28 Ala. 164; *Comstock* v. *Crawford*, 3 Wall. 396. But see *Ferguson* v. *Crawford*, 70 N. Y. (25 Sick.) 253, and cases cited.

§ 14. **Impeachment for fraud.** A stranger to a judgment, as he could not be admitted to reverse it or set it aside, may, in a collateral suit, show that it was obtained by fraud (*Vanderveere* v. *Mason*, 24 N. J. Law, 818; *DeArmond* v. *Adams*, 25 Ind. 455; *Sidensparker* v. *Sidensparker*, 52 Me. 481); but no judgment can be impeached collaterally for fraud by a party or privy to it. Id.; *Field* v. *Sanderson*,

34 Mo. 542; *Smith* v. *Smith*, 22 Iowa, 516; *Greene* v. *Creene*, 2 Gray, 361; *Smith* v. *Abbott*, 40 Me. 442; *Davis* v. *Davis*, 61 id. 395. See *The Acorn*, 2 Abb. (U. S.) 434. And in order to avoid a judgment in a collateral proceeding, for fraud, the fraud must be clearly established. *Hulverson* v. *Hutchinson*, 39 Iowa, 316. It requires more than a doubt to destroy the security of a judgment. *Caldwell* v. *Fifield*, 24 N. J. Law, 150. A party against whom a judgment is rendered will not be permitted to impeach it by proof that the evidence upon which it is founded was false. *Ross* v. *Wood*, 8 Hun (N. Y.), 185; S. C. affirmed, 70 N. Y. (25 Sick.) 8; *Verplanck* v. *Van Buren*, 11 Hun (N. Y.), 328. And see *Patch* v. *Ward*, L. R., 3 Ch. App. 207.

§ 15. **Impeachment for collusion.** Third persons may attack a judgment relied upon against them, by testimony that it is collusive and fraudulent. *Atkinson* v. *Allen*, 12 Vt. 619. Where a collusive judgment comes into collision with the interests of creditors, they may avoid the effect of it by showing it to be a nullity as to themselves. And in doing so, they do not impair its obligation between the original parties, upon whom it is undoubtedly binding; a fraudulent judgment, like a fraudulent deed, being good against all but the interests intended to be defrauded by it. *Thompson's Appeal*, 57 Penn. St. 175. See, also, *Lewis* v. *Rogers*, 16 id. 18; *Miners', etc., Bank* v. *Roseberry*, 81 id. 309. A fraudulent confession of a judgment, and a conspiracy between the plaintiff and defendant, to enable him to purchase goods from a third person on credit, for the plaintiff to levy on, does not avoid the judgment as between the plaintiff and the defendant. *Pattinger* v. *Hecksher*, 2 Grant's (Penn.) Cas. 309.

But while a judgment is conclusive upon parties and privies, and cannot be impeached, still in equity it may be vacated and set aside, where it has been procured by collusion. *Dobson* v. *Pearce*, 12 N. Y. (2 Kern.) 156. It is, however, only in cases where there has been a fraudulent collusion to obtain the judgment which is injurious to parties or privies that a court of equity will interfere to avoid the judgment. The mere concealment of facts by either party to the suit is not regarded as such a fraud. *Field* v. *Flanders*, 40 Ill. 470; *Ross* v. *Wood*, 70 N. Y. (25 Sick.) 8.

§ 16. **Impeachment for usury.** Judgment creditors can question the validity of a prior judgment on the ground of usury. *Bachdell's Appeal*, 56 Penn. St. 386. And a confession of judgment for the face of a note, and interest on the whole from its date, where part of the consideration was not advanced until some time after the date, is fraudulent as to the extra interest, and void against creditors as to the whole. *Scales* v. *Scott*, 13 Cal. 76. But, on an application for a *man-*

*damus* to enforce a judgment, the defendant cannot impeach the judgment on the ground that interest was improperly allowed by it. *Supervisors* v. *United States*, 4 Wall. 435. And see *Twogood* v. *Pence*, 22 Iowa, 543; *Caughman* v. *Drafts*, 1 Rich. (S. C.) Eq. 414.

§ 17. **Impeachment for matters that might have been pleaded and proved.** As a general rule, a party cannot impeach a judgment on any ground which might have been relied upon as a defense to the suit. *Stilwell* v. *Carpenter*, 59 N. Y. (14 Sick.) 414; *Smith* v. *Nelson*, 62 N. Y. (17 Sick.) 286; *Fuller* v. *Smith*, 5 Jones' (N. C.) Eq. 192. Thus, evidence of payment cannot be introduced to collaterally impeach a judgment and sale on execution. *Cadmus* v. *Jackson*, 52 Penn. St. 295. And fraud in the contract recovered on should be set up as a defense, and, therefore, is no ground for subsequently impeaching the judgment. *Hatch* v. *Garza*, 22 Tex. 176. And a party to a judgment at law cannot impeach it, collaterally, on the ground that testimony was false on which it was rendered. *Dilling* v. *Murray*, 6 Ind. 324; *Verplanck* v. *Van Buren*, 11 Hun (N. Y.), 328; *ante*, p. 809, § 14. But the general rule above stated does not apply to a case in which the defendant is a *feme covert* and not *sui juris*. *Griffith* v. *Clarke*, 18 Md. 457; *Higgins* v. *Peltzer*, 49 Mo. 152.

§ 18. **Who may impeach a judgment.** As to who may impeach a judgment sufficiently appears in the preceding sections. It may, however, be stated generally, that the judgment of a court of record is not conclusive except as to parties or privies, and strangers may impeach it collaterally by disproving the facts upon which it was predicated. *Nason* v. *Blaisdell*, 12 Vt. 165. Collateral as well as direct parties may impeach a void judgment, as when confessed through fraud and collusion without indebtedness. *Martin* v. *Judd*, 60 Ill. 78. And see *Brown* v. *Nichols*, 42 N. Y. (3 Hand) 26; *Holbert* v. *Montgomery*, 5 Dana (Ky.), 11; *Finnerran* v. *Leonard*, 7 Allen, 54.

§ 19. **In what proceedings.** Where resort is made to equity to enforce the judgment of a court of law, such judgment will be presumed to have been regularly obtained and will not be inquired into. *Schley* v. *Dixon*, 24 Ga. 273. Nor will a court of law decide, collaterally, that the decree of a court of equity is incorrect. *Gardiner* v. *Miles*, 5 Gill (Md.), 94. Nor can a regular decree of a State court be impeached in the courts of the United States, or of another State. But upon the ground of fraud in procuring it, the decree or judgment of a State court can be adjudged void, either in the courts of the United States, or in those of another State. *Amory* v. *Amory*, 3 Biss. (C. C.) 266. See, as to this point, *Hampton* v. *McConnel*, 3 Wheat. 234; *Engel* v. *Scheuerman*, 40 Ga. 206, S. C., 2 Am. Rep. 573; *San-*

*ford* v. *Sanford*, 28 Conn. 6. If a judgment be valid upon its face, it cannot be invalidated upon *certiorari* and *supersedeas*, when it comes up collaterally, by parol or other proof *dehors* the proceeding. *Witt* v. *Russey*, 10 Humph. (Tenn.) 208. In an action upon a promissory note given in satisfaction of a judgment, the validity of the judgment cannot be impeached. *Mitchell* v. *State Bank*, 2 Ill. 526. And a party cannot attack, collaterally, a judgment by an opposition to a motion. *Frost* v. *McLeod*, 19 La. Ann. 69. And it is held that the failure to name the plaintiffs in a judgment, or a slight discrepancy between the verdict and judgment rendered, cannot be taken advantage of when such judgment is offered as a muniment of title to support a sheriff's deed made under it. *Wyche* v. *Clapp*, 43 Tex. 543.

§ 20. **Upon what evidence.** We have already seen (*ante*, p. 805, § 9), that in order to give binding effect to a judgment of any court, whether of general or limited jurisdiction, it is essential that the court should have jurisdiction of the person as well as the subject-matter, and that the want of jurisdiction over either may always be set up against a judgment when sought to be enforced, or any benefit is claimed under it. But many of the cases hold that, in the case of a domestic judgment of a court of general jurisdiction, parties and privies are estopped in collateral actions to deny the jurisdiction of the court over the person as well as the subject-matter, unless it appear on the face of the record that the court had not acquired jurisdiction; and that, in such cases, there is a conclusive presumption of law that jurisdiction was acquired by service of process, or the appearance of the party. See *Granger* v. *Clark*, 22 Me. 128; *Penobscot R. R. Co.* v. *Weeks*, 52 id. 456; *Cook* v. *Darling*, 18 Pick. 393; *Prince* v. *Griffin*, 16 Iowa, 552; *Clark* v. *Bryan*, 16 Md. 171; *Hahn* v. *Kelly*, 34 Cal. 391; *Wingate* v. *Haywood*, 40 N. H. 437; *Coit* v. *Haven*, 30 Conn. 190. But the doctrine established by the New York decisions is, that want of jurisdiction will render void the judgment of any court, whether it be of superior or inferior, of general, limited or local jurisdiction, or of record or not; and that the bare recital of jurisdictional facts in the record of a judgment of any court is not conclusive, but only *prima facie*, evidence of the truth of the fact recited, and the party against whom a judgment is offered is not, by the bare fact of such recitals, estopped from showing by affirmative proof that they were untrue, and thus render the judgment void for want of jurisdiction. *Bolton* v. *Jacks*, 6 Robt. (N. Y.) 166, 198; *Ormsby* v. *Jacques*, 12 Hun (N. Y.), 443.

Thus, it is held that a recital in a judgment in an action for a foreclosure, that a defendant was served with process and appeared therein,

is not conclusive and does not preclude such defendant, in an action brought by him to foreclose a junior mortgage, from showing that he was not in fact served, and that he did not appear. Nor is such defendant precluded by what purports to be an appearance on his behalf signed by an attorney attached to the roll, from showing that the paper was a forgery. *Ferguson* v. *Crawford*, 70 N. Y. (25 Sick.) 253. And there is held to be no distinction in these respects between the effect of domestic and foreign judgments, and the principle applies as well to the records of judgments of courts of general as of limited jurisdiction. Id. And see *Hoffman* v. *Hoffman*, 46 N. Y. (1 Sick.) 30; S. C., 7 Am. Rep. 299; *Kerr* v. *Kerr*, 41 N. Y. (2 Hand) 272; *Norwood* v. *Cobb*, 24 Tex. 551; *Folger* v. *Columbian Ins. Co.*, 99 Mass. 267; *Cox* v. *Cox*, 19 Ohio St. 502; S. C., 2 Am. Rep. 415; *Leith* v. *Leith*, 39 N. H. 20. Other cases, however, hold that where the record is sufficient to show jurisdiction, it may not be disputed. See *Wetherill* v. *Stillman*, 65 Penn. St. 105; *Lapham* v. *Briggs*, 27 Vt. 26; *Lincoln* v. *Tower*, 2 McLean (C. C.), 473; *Westcott* v. *Brown*, 13 Ind. 83. That the judgment of a foreign court is conclusive upon the merits in the courts of another State or nation. See *Godard* v. *Gray*, L. R., 6 Q. B. 139; *Lazier* v. *Westcott*, 26 N. Y. (12 Smith) 146; *Rankin* v. *Barnes*, 5 Bush (Ky.), 20; *Baker* v. *Palmer*, 83 Ill. 568.

Where a judgment is introduced collaterally as evidence, the fact that some other person than the plaintiff, claiming under the defendant by assignment made either before or after the judgment, is beneficially entitled to claim the money, is a distinct collateral fact consistent with the judgment, and may be shown by proof in the same manner as payment or satisfaction of the judgment. *Groshon* v. *Thomas*, 20 Md. 234.

If a judgment be confessed upon a note professing to be for value received, and the creditors of the party confessing attempt to impeach the judgment by showing that the note was not given for value, but was fictitious and fraudulent, it is competent for those who have taken the judgment, to show what was in fact the consideration for which the note was given. *Harris* v. *Alcock*, 10 Gill & J. (Md.) 226.

It is held that the insufficiency of the proof to sustain a decree is not a ground on which it can be attacked for want of jurisdiction by a bill filed for that purpose. *Martin* v. *Porter*, 4 Heisk. (Tenn.) 407.

# CHAPTER XXVIII.

## FRAUD.

### ARTICLE I.

#### OF FRAUD AS A DEFENSE.

**Section 1.** See Generally, Vol. 3. Wait's Actions and Defenses, Chapter 72, pp. 429–486.

Positive fraud vitiates every thing, contracts, obligations, deeds of conveyance, and even the records and judgments of courts; and contracts entered into upon fraudulent representations are voidable at the election of the party defrauded. *Jones* v. *Emery*, 40 N. H. 348; *Hull* v. *Erwin*, 66 N. Y. (21 Sick.) 649. The rule is universal, that whatever fraud creates, justice will destroy. *Vreeland* v. *The N. J. Stone Co.*, 29 N. J. Eq. (2 Stew.) 188. If a man misrepresents a fact, to that fact he is bound, if any other person, misled by such misrepresentation, acts upon it, and thereby suffers damage. *Beattie* v. *Lord Ebury*, 7 L. R., H. L. Cas. 102; S. C., 30 L. T. (N. S.) 581; 22 W. R. 897; *Jones* v. *Emery*, 40 N. H. 348. And it is as much a positive fraud, to assert that which is not known to be true, as to assert what is known not to be true. *Bennett* v. *Judson*, 21 N. Y. (7 Smith) 238; *Indianapolis, etc., Railway Co.* v. *Tyng*, 63 N. Y. (18 Sick.) 653. Where a person makes a false statement, not knowing that it is false, but knowing facts sufficient to put him upon inquiry, he is liable for the consequences, to the same extent as if he had actual knowledge. *Craig* v. *Ward*, 3 Abb. (N. S.) 235; 1 Abb. Ct. App. 454; 3 Keyes, 387. Indeed it has been held that misrepresentation of a material fact made by one party to a contract constitutes legal fraud, if acted on by the other party, even though such misrepresentation was made innocently through mistake. *Frenzel* v. *Miller*, 37 Ind. 1; 10 Am. Rep. 62; *Elder* v. *Allison*, 45 Ga. 13. A party who is induced to enter into a contract through the fraud of the other party, may repudiate the contract, or claim an abatement of the price to the extent of the damage suffered. To make this rule applicable, however, there must first be proof of the fraud. *Jackson* v. *Jackson*, 47 Ga. 99. In general, fraud as to the *consideration* is not pleadable at

common law, in bar of an action of ejectment founded on a deed. *Osterhout* v. *Shoemaker*, 3 Hill, 513; *Escherick* v. *Traver*, 65 Ill. 379. It is otherwise where the fraud relates to the *execution* of the deed. Id.; *Slocum* v. *Despard*, 8 Wend. 615. As to impeaching the consideration of specialties, see Vol. 1, p. 701; or as to fraud, Id., pp. 701, 702. And a mere allegation of fraud, without injury, is not available as a defense in equity. *Meyer* v. *Yesser*, 32 Ind. 234.

False and fraudulent representations, in order to afford a ground for avoiding a contract, must be made in respect to matters of fact, and not of law. *People* v. *San Francisco*, 27 Cal. 655. Vol. 3, p. 434.

§ 2. **Where fraud is a defense.** See *ante*, Vol. 5, p. 794; Vol. 1, pp. 376, 397, 400, 699. It may be said generally that fraud may be urged as a defense whenever it would serve as the basis of an action for damages. Substituting a different instrument, from that which a party supposes he is executing, by the other party thereto, is such a fraud as will prevent a recovery on the instrument executed. *Byers* v. *Daugherty*, 40 Ind. 199; *Laidla* v. *Loveless*, id. 211. Vol. 1, p. 566.

Fraudulent representations by one party to a settlement of differences relating to farm accounts, whereby the other's agent, who was unacquainted with the real facts, was induced to make the contract, when the principal was absent from the State, constitutes a good defense to an action of debt thereon. *May* v. *Magee*, 66 Ill. 112.

For a creditor to induce his debtor, by promise of further advances, to give a mortgage securing an antecedent debt, and then to refuse the advances, is a fraud which warrants a court of equity in annulling the mortgage, or the facts may be set up in defense of the mortgagee's suit to obtain possession of the mortgaged property. So it was held in the case of a chattel mortgage, which embodied the engagement for the further advances. *Gross* v. *McKee*, 53 Miss. 536. Where a promissory note is executed in pursuance of a fraudulent combination between the maker and the payee to cheat a third person, by causing him to believe that a falsely pretended transaction between said maker and payee is genuine, and thereby inducing said third person to consummate, in good faith on his part, a similar transaction between him and said payee, neither party to such note can have any remedy thereon against the other. *Overshiner* v. *Wisehart*, 59 Ind. 136.

§ 3. **When fraud is not a defense.** Fraud between the parties to the action and a stranger, to defeat the rights of creditors of the latter, cannot be pleaded in bar to the action. *Moore* v. *Thompson*, 6 Mo. 353. A surety in a bail bond or undertaking is not released by the fact that he was induced to sign by fraud or false representations, unless the party to whom the obligation was executed is chargeable with the

fraud. A fraud practiced by the obligor upon his surety cannot be set up as between the surety and the obligee. *Lepper* v. *Nuttman*, 35 Ind. 384. Hence, where in a suit to revive and enforce a judgment against replevin bail the bail answered that the defendant in the replevin suit procured his consent to become replevin bail on another judgment; that he, at the request of defendant, went with him to the clerk's office to execute the same; that he is a German and cannot read English script; that the record was not read to him, but that the deceased fraudulently represented that it was the judgment he had consented to stay; that relying on this representation he executed the undertaking set forth; that at the time he had no knowledge of the judgment sued on, and that, if he had known it was a different judgment, he would not have become replevin bail thereon, it was held that the answer was bad, because it did not connect the judgment plaintiff with the deceit. Id.

The fact that a person was induced to sign his name as surety to a negotiable note, without reading it, under the representations of the maker that it was payable to a bank, when it was, in fact, payable to an individual, constitutes no sufficient defense to the note in an action thereon by the payee, when it does not appear that he had any knowledge of the alleged fraud. *Wright* v. *Flinn*, 33 Iowa, 159. See Vol. 1, p. 566; *Sim* v. *Pyle*, 84 Ill. 271; *Shirts* v. *Overjohn*, 60 Mo. 305; *Kellogg* v. *Curtis*, 65 Me. 59.

A representation in the prospectus of a stock company that the remainder of their capital stock was to be subscribed, and that the company had full confidence that such subscriptions would be obtained, was not the statement of any fact then existing, but a mere opinion of what would be, and if erroneous, formed no defense to an action to recover the price of the stock. *Holdredge* v. *Webb*, 64 Barb. (N. Y.) 9.

To the complaint in an action upon a written instrument, executed by the defendants, acknowledging the receipt of, and promising to return to the plaintiff, a certain sum in United States seven-thirty bonds, the defendants answered, admitting the execution of such instrument, but averring, that at the date thereof, the plaintiff had had on deposit, in a bank of which the defendants were officers, a sum in currency equal to the amount mentioned in such receipt; that, in order to fraudulently avoid taxation on such currency, the plaintiff surrendered his certificate, evidencing such deposit, and, in lieu thereof, received the instrument in suit, though no such bonds were ever received as therein recited. It was held that the facts thus pleaded constituted no defense. The money was not withdrawn from taxation by the transaction described, and the intent of the plaintiff to escape

the payment of the tax upon it was no reason why the defendants should not perform their written obligation to deliver the bonds. *Stillwell* v. *Corwin*, 55 Ind. 433; 23 Am. Rep. 672.

An answer in a suit by the payee of a note against the maker, alleging the procuring of the note by fraud, was held bad on account of defendant's *laches*, in a case depending upon particular facts. *Dutton* v. *Clapper*, 53 Ind. 276.

False representations made by one party to another to induce him to enter into a contract, will not avoid the contract unless it is shown that the party complaining relied upon such representations and was thereby misled and induced to make such contract. *Dunning* v. *Cresson*, 6 Oreg. 241; Vol. 3, p. 440.

§ 4. **Of the right to interpose the defense.** See *ante*, Vol. 3, pp. 470–475. A party who sets up a fraudulent misrepresentation of facts as a ground of defense to an action on a written contract, must not be guilty of *laches*, and if it appears that he did not use ordinary diligence in acquiring a knowledge of the facts, and that he did not stand in a relation to the party making the representations which authorized him to rely upon them without inquiry, he cannot avail himself of such representations as a ground of defense. *Steamboat Belfast* v. *Boon*, 41 Ala. 50. See *Clough* v. *London & Northwestern Ry. Co.*, 20 W. R. 189. And he who knowingly accepts and retains any benefit under a contract tainted with fraud, or who uses the property acquired as his own, after the discovery of the fraud, or who does any positive act forgiving the fraud, or unduly delays claiming back his property, or giving up what he received, affirms the validity of the contract. *Negley* v. *Lindsay*, 67 Penn. St. 217; 5 Am. Rep. 427. And see *Morrison* v. *Universal Marine Ins. Co.*, 21 W. R. 774; *Blydenburgh* v. *Welsh*, 1 Bald. 331; *Ayers* v. *Hewett*, 19 Me. 281; *Roberts* v. *Barrow*, 53 Ga. 314. But fraud cannot be condoned unless there is full knowledge of the facts and of the rights arising out of those facts, and the parties are at arms length. *Moxon* v. *Payne*, L. R., 8 Ch. App. 881; 7 Eng. R. 442. And the rule, that a party seeking to set aside a contract must place the opposite party in *statu quo*, is not applicable to a case where a deed has been obtained by fraud and without consideration. *Freeman* v. *Reagan*, 26 Ark. 373.

A person cannot avoid his own act because it was fraudulent. *Hughes* v. *Littlefield*, 18 Me. 400. And to obtain relief on the ground of fraud in the making of a voluntary conveyance, the party seeking it must be free from any participation in the fraud. *Fitzgerald* v. *Forristal*, 48 Ill. 228.

A mere creditor at large is not in a position to attack a sale of goods

by his debtor on the ground of want of delivery and change of possession under the statute of frauds; before he can do so he must acquire a lien by attachment or otherwise. *Clute* v. *Steele*, 6 Nev. 335. Where property has been duly attached, and taken possession of by the sheriff, the plaintiff is not deemed a mere creditor at large, but one having a specific lien upon the property attached. *Rinchey* v. *Stryker*, 31 N. Y. (4 Tiff. 140); 26 How. 75; *Parshall* v. *Eggert*, 54 N. Y. (9 Sick.) 18, 22.

In an action upon a promissory note by an indorsee against the maker, proof may be given by the latter, where the facts are pleaded, that the note was obtained from him through fraud of the payee, and upon such proof, the indorsee is required to show himself to be a holder *bona fide*, and for a valuable consideration. *Cummings* v. *Thompson*, 18 Minn. 246.

Where two persons fraudulently combine to defraud a third party, neither of the former can have any remedy against the other. The law leaves them just where they placed themselves. *Overshiner* v. *Wischart*, 59 Ind. 135, 138.

§ 5. **Mode of setting it up.** See *ante*, Vol. 1, pp. 701, 702. When a party relies upon fraud, either to support his cause of action, or in defense, he must set up the specific acts which constitute the fraud. *Capuro* v. *Builders' Ins. Co.*, 39 Cal. 123; *Hynson* v. *Dunn*, 5 Ark. 395; *Giles* v. *Williams*, 3 Ala. 316. A general allegation that the defendant was induced to execute the contract by means of fraud, covin and misrepresentation by the plaintiff and others in collusion with him is bad on demurrer. *Jones* v. *Albee*, 70 Ill. 34; *Cole* v. *Joliet Opera House Co.*, 79 id. 96. But see *Pemberton* v. *Staples*, 6 Mo. 59; *Fox* v. *Webster*, 46 id. 181. But a bill containing as full an allegation of fraud as could be made, although all the circumstances attending the fraud were not stated, was held sufficient on demurrer. *Henry County* v. *Winnebago, etc., Drainage Co.*, 52 Ill. 299. And a general allegation of fraud is, on demurrer, an answer to an alleged contract, although the pleading alleging the contract shows that the person defrauded took a special benefit under the contract. *Irlam* v. *Midland Railway Co.*, 23 W. R. 660. And when facts are set forth in a pleading, from which, if proved, the court must infer fraud, it is not necessary to charge fraud specially. See *Canham* v. *Barry*, 15 C. B. 597; 24 L. J. C. P. 100; *Mussina* v. *Goldthwaite*, 34 Tex. 125; 7 Am. Rep. 281; *Van-Wy* v. *Clark*, 50 Ind. 259; *May* v. *Magee*, 66 Ill. 112.

The ordinary plea of fraud in an action on a contract contains an averment by implication that the defendant repudiated the contract, and

if the defendant has affirmed the contract, the plea is not proved, and no special replication is needed. *Dawes* v. *Harness*, L. R., 10 C. P. 166; 44 L. J. C. P. 194; 32 L. T. (N. S.) 159; 23 W. R. 398; *Anderson* v. *Costello*, 19 id. 628.

In an action on an agreement, in which fraud is pleaded, a willful misrepresentation must be shown. *Stevens* v. *Webb*, 7 C. & P. 60.

On a plea by a defendant of fraud and covin, it is only competent in him to give evidence of particular fraud practiced upon him on a given occasion, and not that the transactions of the plaintiff are generally fraudulent with respect to society at large. *Green* v. *Goslen*, 4 Scott, N. R. 13; S. C., 2 M. & G. 446; 5 Jur. 1010.

A special plea averring fraud is not bad because it amounts only to the general issue, for, strictly, the allegation of fraud can only come in through a special plea. *Cummings* v. *Boyd*, 83 Penn. St. 372.

To an action by a company against a shareholder for calls, a plea that he was induced to become a shareholder by the fraud of the company; that he had never recognized, since notice of the fraud, any rights or liabilities in him, as such shareholder, nor received any benefit from his shares, and that within a reasonable time after notice of the fraud, he repudiated the shares and gave notice to the company of his repudiation, is a good plea. *Welch-y-Plwm Lead Mining Company* v. *Baynes*, L. R., 2 Exch. 324; S. C., 36 L. J. Exch. 183; 15 W. R. 1108; 16 L. T. (N. S.) 597.

A plea of fraud is good as against an assignee of a bill obligatory. *Ewing* v. *Miller*, 1 Mo. 234. See *Jones* v. *Baum*, 5 Blackf. 154.

§ 6. **How proved.** See *ante*, Vol. 3, p. 445 *et seq.* To constitute a fraud by false representation such as will entitle the complaining party to relief, three things must concur: There must be a false representation; the complaining party must have believed it to be true, and relied upon it, and have been deceived thereby; and it must appear that the representation was of some matter or thing relating to the contract or transaction in or about which the representation was made, so that, if true, it was to the advantage of the party to whom it was made, and being false, caused him damage and injury. *Masterton* v. *Beers*, 1 Sweeny (N. Y.), 406; *Byard* v. *Holmes*, 34 N. J. Law, 296. Courts will never assume fraud from mere obscurity or apparent error, more especially when, from lapse of time, it has become impossible to clear up the obscurity or explain the error. *Picot* v. *Bates*, 47 Mo. 390; *Weisiger* v. *Chisholm*, 28 Tex. 780; *Bridgeford* v. *Simonds*, 18 La. Ann. 121. But where fraud is imputed, and the answer is responsive, and the denial positive, satisfactory proof to support the bill of complaint may be made by circumstances alone, or partly by circumstances and partly by direct testimony, or entirely by the latter. *Parker*

v. *Phetteplace*, 2 Cliff. 70; *Lowry* v. *Beckner*, 5 B. Monr. 41; *Shegog* v. *Shegog*, Riley, 270. And while fraud cannot be established by circumstances that merely raise a suspicion, yet, where they are so strong as to produce conviction of the truth of the charge, although there may remain some doubt, then fraud is proved. *Bryant* v. *Simoneau*, 51 Ill. 324. The fraudulent intent of an act may be shown by proof of a subsequent fraudulent act, when both acts form part of one transaction. *Lynde* v. *McGregor*, 13 Allen (Mass.), 172; *Perkins* v. *Prout*, 47 N. H. 387; *Huntingford* v. *Massey*, 1 F. & F. 690. The evidence need not be so conclusive as to preclude a reasonable doubt. *Strader* v. *Mullane*, 17 Ohio St. 624. Facts or circumstances which, in their nature, are inconsistent with good faith, when shown to exist, necessarily tend to prove fraud, and though the jury must judge of their weight, yet in such a case it is clearly within the province of the court to instruct the jury as to the tendency of such evidence. But it is error to instruct them that facts, proper and innocent in themselves, tend to prove fraud, or that fraud may be inferred from their existence. *Kane* v. *Drake*, 27 Ind. 29; Vol. 3, p. 445.

§ 7. **What not sufficient proof.** Fraud may be established by proving circumstances from the existence of which a fraudulent intent is a natural and irresistible inference. It cannot be assumed without proof or inferred from mere ground of suspicion; but positive and direct proof is not required. *Reed* v. *Noxon*, 48 Ill. 323; *Waddingham* v. *Loker*, 44 Mo. 132; *Matter of Vanderveer*, 20 N. J. Eq. (5 C. E. Gr.) 463. See *Mahony* v. *Hunter*, 30 Ind. 246. Representations by a creditor to a debtor, that he did not wish for the property so much for his own security, as to secure it for the debtor from attachment by other creditors, made to obtain a bill of sale of property to secure a debt then justly due, are not conclusive evidence of fraud, but circumstances to be left to the jury from which they may infer fraud. *Reynolds* v. *Wilkins*, 14 Me. 104. Inadequacy of consideration, alone, is no ground for inferring fraud, unless so great as at once to strike every person with its grossness. *Godfrey* v. *Beardsley*, 2 McLean, 412. Mere falsity of representation is not sufficient to show fraud; the representation must also appear to have been made with a knowledge of the falsity, or under such circumstances as manifested a recklessness of truth, without knowing whether it was true or false. *Barnett* v. *Stanton*, 2 Ala. 181; *ante*, p. 813. A declaration, stating that the defendant, on the sale of Teneriffe barilla, asserted that 7½ cwt. would produce a ton of soap, well knowing that it would not do so, is not supported by evidence that he said he had made seven tons of soap out of 51 cwt. without giving proof of the scienter. *Horncastle* v. *Moat*, 1 C. & P. 166; Vol. 3, p. 445.

§ 8. **Of the burden of proof.** See *ante*, Vol. 3, p. 445 *et seq.* The facts necessary to establish fraud must be averred and proved affirmatively by the party who alleges and relies upon it. *Klein* v. *Horine*, 47 Ill. 430; *Beatty* v. *Fishel*, 100 Mass. 448; *Tomlinson* v. *Payne*, 8 Jones' L. (N. C.) 108; *Fifield* v. *Gaston*, 12 Iowa (4 With.), 218; *Blaisdell* v. *Cowell*, 14 Me. 370. So, if the defendant in an action on a bond undertakes by his plea to impeach the consideration on the ground of fraud, the burden is upon him to show that the bond was procured by fraud, or given without consideration. *Rankin* v. *Badgett*, 5 Ark. 345; Vol. 3, p. 445.

§ 9. **Evidence to rebut fraud.** Where fraud is charged, a party may introduce rebutting evidence, tending to show that only a mistake has been committed. *Juniata Bank* v. *Brown*, 5 S. & R. 226; *Ayers* v. *Scribner*, 17 Wend. 407. And he who knowingly accepts and retains any benefit under a contract tainted with fraud, or who uses the property acquired as his own, after the discovery of the fraud, or who does any positive act forgiving the fraud, or unduly delays claiming back his property or giving up what he received, affirms the validity of the contract. *Negley* v. *Lindsay*, 67 Penn. St. 217; 5 Am. Rep. 427. Such facts may be urged as evidence rebutting a defense of fraud. And in reply to proof tending to establish a fraudulent design on the part of a vendor, in the sale of all his property to one creditor, excluding others, it is proper to show that the entire proceeds of the sale were immediately applied in payment of the vendor's debts. And it is also legitimate to examine the purchaser as to his intention in making the purchase. *Bedell* v. *Chase*, 34 N. Y. (7 Tiff.) 386.

§ 10. **Effect of fraud as a defense.** Fraud and extortion in procuring a written agreement if established, whether it be technically duress or not, will invalidate the instrument. *Gardner* v. *Lewis*, 7 Gill (Md.), 377. Fraud renders a contract void, and not voidable merely, and the contract cannot be confirmed without a new consideration. *Miller's Appeal*, 30 Penn. St. 478; *Butler* v. *Haskell*, 4 Desaus. 651, 707–717.

Where a purchaser has been induced to make the purchase through the assertion by the agent of the vendor of a very material fact, which turns out to be false, and as to which the vendee had no means of obtaining correct information, he is entitled in an action against him, on the articles of agreement, where the contract has been in part complied with on his part, to a deduction from the sum claimed in the action, to the amount of the difference between the value of what he received, and what he thought he was purchasing. *Pennock* v. *Tilford*, 17 Penn. St. 456.

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